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Supreme Court of the United States

OCTOBER TERM 1961

No. 683

RAUL PINTO,
Petitioner,

against

STATES MARINE CORPORATION OF DELAWARE,
Respondent.

GEORGE HOOPER,
Petitioner,

against

TERMINAL STEAMSHIP COMPANY,
Respondent.

GEORGE EZEKIEL,
Petitioner,

against

VOLUSIA STEAMSHIP CO., and
SUWANEE STEAMSHIP CO.,
Respondents.

GEORGE RICHTER,
Petitioner,

against

MATHIASEN'S TANKER INDUSTRIES, INC., and S.S. MICHAEL J. her engines, hull, tackle, cargo and her appurtenances thereof,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals

for the Second Circuit entered in the above causes as follows:

Raul Pinto, October 26, 1961
George Hooper, November 24, 1961
George Ezekiel, December 15, 1961
George Richter, December 26, 1961

Opinions Below

The opinions of the Court of Appeals in these cases are not reported as yet. The opinions are printed in full in the appendix herein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 2101. The joint petition is authorized by Rule 23, subd. 5 of the Rules of the Supreme Court of the United States.

Questions Presented

Three seamen and one longshoreman petition for a writ of certiorari to review the interpretation of the concept of warranty of seaworthiness applicable to maritime accidents.

1. Which is the correct interpretation of the concept of warranty of seaworthiness; the concept that the warranty is of a positive, affirmative and continuing nature, as expressed by Circuit Judge Clark and Circuit Judge Smith in their dissenting opinions,* or that the warranty may be invoked only upon proof of negligent causation and notice, but in no event, applicable to dangerous unsafe seaboard conditions which are inherent in the nature of the work, as held by the Court below?

2. Is it within the province of a Circuit Court of Appeals to enunciate limitations as to time, place and circumstances as to the duty of a shipowner to provide a seaworthy vessel to its crew and longshoremen working aboard ship, and

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* Footnote Appendix.

thus by erroneous and unauthorized judicial legislation destroy well recognized and established substantial rights of accident victims in maritime service.

In addition to the aforesaid questions which are common to all the petitions, petitioner Pinto prays for consideration and review of the following additional question:

3. Is a Circuit Court of Appeals acting within its province when it refuses to consider an exception to an erroneous charge, on the basis that the exception was not made in accordance with the use of precise language which the Court of Appeals felt should have been used? Is it not rather the duty of the Trial Court to instruct the jury as to the correct meaning of the warranty of seaworthiness, irrespective of any request to charge, and the duty to correct an erroneous charge specifically called to the Trial Court's attention, regardless of the phraseology of the exception or the request to correct the error?

Statement

This is a consolidated appeal brought by three crew members and a longshoreman, involving two common questions of law and a separate question, in addition thereto, by petitioner, Pinto.

Statement of Facts as to Petitioner Pinto

Pinto was a seaman aboard the SS. Clovis Victory, a government owned vessel which defendant operated. While the ship was at sea, the third mate directed Pinto and a helper, Fantroy, to carry a heavy signal light from the wheel-house to the engine room for repairs. In descending the ladder leading into the engine room, Pinto slipped and fell, allegedly sustaining a serious injury to his back. The action, in which Federal jurisdiction was predicated upon the Jones Act, 46 U. S. C. § 688, was brought on the "law" side, with a jury trial demanded.

The case was submitted to the jury solely on the basis of unseaworthiness, a claim of negligence having been withdrawn by the plaintiff. The jury found for defendant, and judgment was entered accordingly. Only two of the three theories of unseaworthiness advanced below require consideration here[1]—"operating" unseaworthiness, in that some other method should have been adopted for conveying the light to the engine room, and unseaworthiness based on the alleged presence of grease or oil on the step of the ladder where Pinto slipped.

The foregoing is a factual summary which is literally quoted from the opinion by the Court below, decided October 26, 1961, Chief Judge Lumbard, Circuit Judges Friendly and Smith, Circuit Judge Smith dissenting, affirming the decision of the judgment entered on the jury's verdict.

A petition for rehearing in banc, submitted on November 9, 1961 and decided on November 28, 1961, was denied per curiam, Circuit Judge Clark and Circuit Judge Smith dissenting.

Statement of Facts as to Petitioner, George Hooper

This was a civil action tried by United States District Judge David N. Edelstein without a jury. On March 22, 1961, judgment was entered dismissing the complaint.

Petitioner's case is set forth by Judge Edelstein in his findings of fact as follows:

> "17. On June 27, 1954, George Hooper and a fellow longshoreman known as Eugene Gatto were engaged in crating, jacking and compiling drafts of

[1] The third was that the step on which Pinto fell was worn and slick; no complaint is made with respect to the charge on that score and the fact thus must be taken as established for the defendant by the verdict.

lumber in such a manner as to enable the ship's gear to lower them over the side.

18. Between 2:30 and 3:30 p. m. on June 27, 1954, Hooper and Gatto were working in the vicinity of the No. 4 and No. 5 hatches preparatory to discharging a draft of lumber some 5' high, and 12' to 14' in length. The draft was loaded fore and aft and the top layer of the after end fanned out, requiring straightening.

19. In the process of preparing the load for discharging; Hooper faced the draft of cargo with his back toward the rail near the offshore side of the vessel, sank a cargo hook into the board furthest away from him and started to pull a plank into position. While in the act of so doing, the footing, consisting of further lumber cargo, shifted so as to cause Hooper to be thrown off balance to his side. As Hooper lost his balance, he tried to steady himself by holding on to the hook, but the hook twisted out of the plank and Hooper, with the hook in his hand, fell over the side of the ship into the water, some 35' below."

On November 24, 1961, the Circuit Court of Appeals, Chief Judge Lumbard, Circuit Judge Medina and Circuit Judge Waterman, affirmed the decision of the Trial Court.

Statement of Facts as to Petitioner, George Ezekiel

The facts are set forth in the following excerpt from the decision of December 15, 1961, by Circuit Judges Clark, Hincks and Friendly, opinion by Judge Friendly:

"Plaintiff, a Honduran seaman, brought this action in 1957, in the District Court for the Southern District of New York, against a Liberian corporation for an injury to his eye suffered while he was chipping rust aboard M/V Arctic Reefer, a Liberian vessel, in Guatemalan waters. The action was brought on the "law" side, and a jury trial was demanded. In

the spring of 1961, plaintiff consented to a transfer to the "admiralty" side, withdrew the claims asserted for maintenance and cure and for negligence under the Jones Act, 46 U. S. C. § 688, and agreed to proceed solely on a theory of unseaworthiness. It was stipulated that liability was governed by Liberian law and that Liberia has adopted the nonstatutory general maritime law of the United States.

Plaintiff's evidence on the issue of liability consisted of his own deposition and the testimony of a Captain Mandrill, called as an expert. Shortly after 8 A. M. on May 19, 1956, plaintiff began to chip rust, with a hammer, from a blower on the top of the deck above the engine room. About an hour later a piece of rust flew off and hit his right eye. He was not wearing goggles. He claimed that he had none, that the boatswain kept them, that he had asked the boatswain for some before starting work, and that the boatswain claimed to have no more. He was unable to recall the name of the boatswain, although he had been on the ship for almost a year. Mandrill testified it was bad practice for a boatswain to allow a seaman to chip rust without wearing goggles."

The Court below, Chief Judge Lumbard, Circuit Judge Medina and Circuit Judge Waterman, affirmed the Trial Court's decision on December 26, 1961.

Circuit Judge Clark dissented.

Statement of Facts as to Petitioner, George Richter

The following findings of fact by Trial Judge G. G. Noonan set forth the factual situation.

"FINDINGS OF FACT

1. The libelant, an alien seaman, was employed in the capacity of Second Assistant Engineer on board the S.S. Michael J, a tanker of Liberian registry, at monthly wages of $325.

2. The respondent, Mathiasen's Tanker Industries, Inc., was and is a foreign corporation licensed to do business in the State of Pennsylvania.

3. The respondent, Mathiasen's Tanker Industries, Inc., managed, operated and controlled the merchant vessel S.S. Michael J.

4. The libelant served on board the S.S. Michael J from October 1, 1957 until October 31, 1957.

5. On October 11, 1957 the S.S. Michael J departed from San Juan, Puerto Rico, in ballast for Jacksonville, Florida.

6. On October 17, 1957, between the hours of 9:00 A. M. and 10:00 A. M., the libelant proceeded to the boiler room of the S.S. Michael J to check or inventory the spare parts.

7. The spare parts were stored on shelves in a small room located on the port side of the engine room.

8. In the course of making his check the libelant stood on a metal shelf about one foot off the deck. To steady himself the libelant held on to a higher shelf with his left hand.

9. No ladder was available to the libelant for use in making his check and, in fact, due to the size of the storeroom, the use of a ladder was not feasible.

10. The libelant fell from this position and landed on the deck. As a result of his fall he sustained personal injuries the most serious of which was a fracture of the right ankle."

The Court below, Chief Judge Lumbard, Circuit Judge Medina and Circuit Judge Waterman, affirmed the Trial Court's decision on December 26, 1961.

Reasons for Granting the Writ

1. The decisions by the Court below violate the admonitions of the Supreme Court and establish concepts of law in conflict with uniform and prevailing opinion of all other Courts. This error would probably have been corrected by the Court below "*in banc*" but for "a panel precedent".*

In the words of Circuit Judge Clark, in the dissenting opinion in the *Ezekiel* case, *supra*:

> "This view confuses the nature of the obligation, however, because it suggests that liability is limited to defendant's negligence. It seems to be an attempt to introduce negligence concepts by the back door, as it were, utilizing the rule that a seaworthy ship and its appurtenances need only be "reasonably fit for their intended use" to evade the Supreme Court's repeated admonitions that "the duty to provide a seaworthy ship depends not at all upon the negligence of the shipowner or his agents." Mitchell v. Trawler Racer, Inc., supra; 362 U. S. 539, 548. See also Pope & Talbot, Inc. v. Hawn, 346 U. S. 406; Alaska S.S. Co. v. Petterson, 347 U. S. 396; Rogers v. United States Lines, 347 U. S. 984; Boudoin v. Lykes Bros. S. S. Co., 348 U. S. 336."

2. The decision by the Court below constitutes a radical departure from the law as laid down by the Supreme Court.

In the words of Circuit Judge Smith, in his dissenting opinion in the *Pinto* case, *supra*:

> "This seems to me to import a time element into the concept of seaworthiness which time element was rejected by the Supreme Court in Mitchell v. Trawler Racer, Inc. (1960), 362 U. S. 539."

3. The Court below has, in fact, adopted the minority view of the Supreme Court, rather than the prevailing opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926, as stated by Circuit Judge Clark in his dis-

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* See dissent *Pinto* petition for rehearing *in banc*. *Pinto* case by Circuit Judge Clark, concurred in dissent by Judge Smith.

senting opinion in *Pinto, supra*, when the petition for a rehearing in banc was denied, Judge Clark stating as follows:

> "Judge Smith's compelling dissent points up a developing problem stemming from discontent with the Supreme Court's expansion of the concept of *unseaworthiness* on the part of those brethren who find themselves in greater sympathy with the views of the dissenters than those of the majority in the quite similar case of *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539. I suggest that a reading of the opinions there, particularly the dissenting opinions, against the opinions herein, will support this conclusion. And the problem is bound to recur often in view of the large number of these cases coming before each panel of our court. The intellectual reaction is understandable, since the minority view was powerfully presented. But whatever we may feel as to the merits of the debate, our duty is surely to apply the presently prevailing law and leave the question of further change to the Court itself. Furthermore, the Court's manifest intent to safeguard human lives at sea and to enforce the shipowner's responsibility by strict liability is not one to combat. But the trend here illustrated toward divergent precedents will make decision increasingly embarrassing for us."

Circuit Judge Clark in the foregoing dissent, in which Circuit Judge Smith concurred, states that the decision by the Court below is believed by him to be contrary to "* * * the clear mandate of the Supreme Court * * *."

4. Conflicting interpretations have now been created by the Court below which require clarification. The decision by the Court below constitutes an intracircuit conflict as to the correct interpretation of a shipowner's duty of seaworthiness.

5. The decisions by the Court below constitute the promulgation of a new concept and radical departure from the interpretation repeatedly enunciated by the Supreme Court of the United States, as to the affirmative, positive and non-delegable duty of a shipowner to provide his crew and busi-

ness invitees, engaged in traditional duties of seamen, with a safe place to work; whereas, heretofore, due care, absence of fault and assumption of risk were not available as defenses to an action bottomed on breach of warranty of seaworthiness, decisions now sought to be reviewed, if permitted to stand, would constitute nullification of well established legal rights. Defenses heretofore held inapplicable in such martime matters would constitute a complete bar to recovery.

6. This new concept now requires affirmative proof of negligent causation, notice and freedom from inherent danger, as conditions precedent for invoking the doctrine of seaworthiness in an action for shipboard accidental damages. This is clearly contrary to the holdings by the Supreme Court of the United States in all prior comparable matters.

7. In conflict with the holding by the Supreme Court in the case of *Hawn* v. *Pope & Talbot*, 346 U. S. 406, 74 S. Ct. 202, and the case of *Troupe* v. *Chicago, D. & G. Bay Transit Co.* (1956), 234 F. 2d 253, and authorities therein cited at pages 259, 260[2], the burden of assuring a charge in accord-

[2] "Plaintiff's position having been made known to the court at the time the ruling was first sought she was not required to repeat the objection when defendant renewed its motion and when the court granted the motion. *Keen* v. *Overseas Tankship Corp.*, 2 Cir., 1952, 194 F. 2d 515, certiorari denied 343 U. S. 906, 72 S. Ct. 1061, 96 L. Ed. 1363; *Sweeney* v. *United Feature Syndicate*, 2 Cir., 1942, 129 F. 2d 904; *Williams* v. *Powers*, 6 Cir., 1943, 135 F. 2d 153, 156; *Green* v. *Reading Co.*, 3 Cir., 1950, 183 F. 2d 716, 719. A point is properly preserved when a party has made known his objection to the trial court and stated the grounds on which he bases his objection. *Keen* v. *Overseas Tankship Corp.*, *supra*; *Irvin Jacobs & Co.* v. *Fidelity & Deposit Co. of Maryland*, 7 Cir., 1953, 202 F. 2d 794, 800-801, 37 A. L. R. 2d 889."

"Without attempting to state a rule or delineate situations in which it would be proper to exercise this discretion in favor of an appealing party, we think the language in *United States* v. *Atkinson*, 1936, 297 U. S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555, and quoted with approval in *Johnson* v. *United States*, 1943,

ance with the correct interpretation of the law has shifted from the Trial Court to the trial attorney to the extent that unless the trial attorney anticipates possible error in a Court's charge, the contents of which are unknown to him before the charge is given, the trial attorney's exception to the error and request to correct the same is legally insufficient, although addressed precisely to the error, if not made in the precise language which the Circuit Court of Appeals feels should have been used in taking the exception. This is in conflict with the holding by the Supreme Court in the case of *Hauch v. Pope & Talbot, supra*, in the case of *Troupe v. Chicago, D. & G. Bay Transit Co., supra*, and other decisions cited in the *Troupe* case. Technical precise conformity with the Court's concept as to appropriate wording is now required, failing which, an erroneous charge and refusal by the Trial Court to correct such error by appropriate charge has been held as not reviewable by the Court below. This makes form and technicality and not substantive justice determinative, which is contrary to well established law, as is pointed out in *Blue v. United States Lines Company*, 286 F. 2d 920, and the many authorities therein cited on page 922.[3]

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318 U. S. 189, 280, 63 S. Ct. 549, 87 L. Ed. 704, vividly calls to mind the type of situation in which we would be favorably disposed to review alleged errors despite the failure of the appealing party to raise his objections below. * * *"

"10. Richmond, F. & P. R. Co. v. Brooks, 1952, 91 U. S. App. D. C. 24, 197 F. 2d 403, appears to hold that any alleged error in the charge on a significant aspect of the case will be considered on appeal despite failure to comply with Rule 51."

Hansel v. Bridgeman, 1941, 312 U. S. 552, 557, 61 S. Ct. 719, 85 L. Ed. 1037; *Troupe v. Chicago Duluth & Georgian Bay Transit Co.*, 2 Cir., 1956, 234 F. 2d 253; *Ehlert v. American Aviation and General Ins. Co.*, 3 Cir., 1954, 212 F. 2d 821, 824-825; *Massachusetts Bonding & Ins. Co. v. Ray Dilschneider, Inc.*, 8 Cir., 1953, 203 F. 2d 556, 568; *Smith v. Welch*, 10 Cir., 1951, 189 F. 2d 832, 836-837; *Dowell, Inc. v. Jeavons*, 5 Cir., 1948, 166 F. 2d 214, 2 A. L. R. 2d 442; *Shokuzan Shimabukuro v. Hiroyoshi Nagayama*, 1944, 78 U. S. App. D. C. 271, 140 F. 2d 13; 5 Moore, Federal Practice, Para. 5104, at 2503-04.

8. In conflict with the holding by this Court in *McAllister* v. *United States*, 348 U. S. 19, 75 S. Ct. 6, the Court below has itself made new findings of fact, not made by the Trial Court, and as to which findings there is no evidence in the record.

9. Dangers which heretofore had been recognized as constituting breach of warranty of seaworthiness and basis for imposing damages for breach of warranty of seaworthiness have been erroneously reclassified as no longer constituting a basis for recovery, by limiting such warranty exclusively to alienable dangers. Is it therefore correct to interpret a shipowner's duty as to warranty of seaworthiness, limited to preventable dangers (as specifically held in petitioner Hooper's case) or to inherent, as well as to alienable, unsafe seaboard conditions?

ARGUMENT

POINT I

There is an intra-circuit conflict which requires clarification and mandate by the Supreme Court of the United States.

The Supreme Court of the United States has in the past granted certiorari to bring about uniformity within the Circuit.

See:

John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221;

Dickinson v. *Petroleum Conversion Corp.*, 338 U. S. 507, 70 S. Ct. 322.

As Mr. Justice Frankfurter has stated in his dissenting opinion in *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500, 530-531, 77 S. Ct. 443, certiorari jurisdiction is exercised on matters of general importance, "or in order to secure uniformity of decision."

POINT II

The decision by the Court below constitutes a radical departure from well established and uniform law.

The holding by the Court below that negligent causation, notice and lack of due care are elements to be proven in order to establish liability for injuries proximately caused by a dangerous shipboard condition, or to grant immunity from liability on the basis that the danger is inherent in the work, constitutes nullification of remedial rights to which seamen and men doing the work traditionally performed by seamen, are entitled as a matter of well established law.

The holding by the Court below constitutes a radical departure from uniform and well established law as expressed by the Supreme Court in the following cases:

Mitchell v. *Trawler Racer, Inc., supra* (362 U. S. 539, 80 S. Ct. 926);
Seas Shipping Co. Inc. v. *Sieracki* (1946), 328 U. S. 85, 66 S. Ct. 872;
Van Carpals v. *S.S. American Harrester* (2d Cir. Dec. 13, 1961);
Michalic v. *Cleveland Tanker, Inc.*, 364 U. S. 325, 81 S. Ct. 6;
Poignant v. *United States* (2d Cir.), 225 F. 2d 595;
Grillea v. *United States* (2d Cir.), 232 F. 2d 919;
The T. J. Hooper (2d Cir.), 60 F. 2d 737, cert. denied *Eastern Transportation Co.* v. *Northern Barge Corp.*, 287 U. S. 662, 53 S. Ct. 220;
Krey v. *United States* (2d Cir.), 123 F. 2d 1008;
Campbell v. *Tidewater Associated Oil Co.*, D. C. S. D. N. Y., 141 F. Supp. 431.

See:
La Guerra v. *Brasileiro* (January 8, 1942), 124 F. 2d 553, cert. denied 315 U. S. 824, 62 S. Ct. 918;
Amador v. *A/S J. Ludwig Mowinckels Rederi* (July 1, 1955), 224 F. 2d 437, cert. denied 350 U. S. 901, 76 S. Ct. 179;

Grillea v. *United States* (April 26, 1956) (rehearing denied), May 4, 1956, 2 Cir. 232 F. 2d 919; *Reddick* v. *McAllister Lighterage Line* (July 14, 1958) rehearing denied Aug. 5, 1958, 258 F. 2d 297, cert. denied 358 U. S. 908, 79 S. Ct. 235; *Rich* v. *Ellerman & Bucknall S.S. Co.* (May 12, 1960), 278 F. 2d 704.

The only case cited by the Trial Court as authority in the *Hooper* case, *supra*, for the decision, is misinterpreted[4]

The case of *Carabellese* v. *Naviera Aznar, S.A.*, 285 F. 2d 355 (2nd Cir. 1960), dealt with a stevedore negligently causing a piece of cargo to fall.

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[4] The *Dixon* case, *supra*, has been cited, with approval, innumerable times, and as recently as May 16, 1960 by the United States Supreme Court, in the case of *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926.

None of the Circuit Court opinions citing *Mitchell* and discussing the issue here involved adopt the position that considerations of "how long" are admissible in an action on unseaworthiness. *Arena* v. *Luckenbach Steamship Co.*, 279 F. 2d 186, 189 (1st Cir. 1960); *Calderola* v. *Cunard Steamship Co.*, 279 F. 2d 475, 477 (2nd Cir. 1960); *Puerto Segura Cia. Naviera, S.A.* v. *Petros Pitsillos*, 279 F. 2d 599, 600 (4th Cir. 1960); *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481, 485 (4th Cir. 1960); *Carabellese* v. *Naviera Aznar, S.A.*, 285 F. 2d 355, 359 (2nd Cir. 1960); *Morales* v. *City of Galveston*, 291 F. 2d 97 (5th Cir. 1961); *Knox* v. *United States Lines Co.*, 294 F. 2d 354, 1961 A. M. C. 1708, 1715 (3rd Cir. 1961).

In *Carabellese*, this Court stated "*Mitchell* * * * settles that a vessel cannot avoid liability for unseaworthiness merely because the owners have had no opportunity to remedy the unsafe conditions" (285 F. 2d at 359).

In the Circuit Court's opinion on remand in *Morales*, the majority opinion did not discuss the time element, essentially taking a position on the facts similar to that expressed by this Court in *Blier*. The vigorous dissent of Judge Rives asserted that time could not be a factor in determining unseaworthiness (291 F. 2d at 98-99).

For a persuasive District Court review of the issue, concluding that duration of condition cannot be a factor in an action on unseaworthiness, see Judge Hoffman's opinion in *Holley* v. *The Manfred Stansfield*, 186 F. Supp. 212, 215-216 (E. D. Va. 1960).

It is incomprehensible that the decision in the *Carabellese* case, *supra*, was so incorrectly interpreted in the face of the following language by Circuit Judge Friendly at page 359:

> "Since there was no evidence that the owner had known or could have known of the latent defect, this must have been designed to bring out that the crate had in effect become a part of the working surface supplied to the longshoreman, so that the owner would be liable for a latent defect in the crate as he would for one in the deck or even, as was held in Grillea v. United States, 2 Cir., 1956, 232 F. 2d 919, for a misplaced cover which the injured longshoreman had himself installed over part of a hatch. The same principle underlies Rich v. Ellerman & Bucknall S.S. Co., 2 Cir., 1960, 278 F. 2d 704. That, like the instant case, related to an injury sustained in loading, but the unseaworthiness lay in the stowage of truck chassis previously loaded which turned out to afford an unstable footing. Thus the chassis in Rich, like the crate in Reddick and the hatch cover in Grillea, had become, as was said in the Grillea case at p. 923, 'as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place.' ..."

Justice HARLAN, before his elevation to the United States Supreme Court, and while gracing the Bench of the United States Court of Appeals for the Second Circuit, in one of the most scholarly decisions ever written on the question of unseaworthiness, in the case of *Dixon* v. *United States*, 219 F. 2d 10, decided February 7, 1955, explained, in detail, the shipowner's duty to furnish a seaman with a safe place to work, tracing the law back to the case of *The Noddleburn*, D. C. D. Or. 1886, 28 F. 855.

Richter was required to ascend and descend from one level to another without a ladder and without anything whatsoever to hold onto in order to keep from slipping

and falling from a precarious perch, the only means available whereby to perform his duties.

Such physical conditions constitute unseaworthiness as well as undue exposure of a seaman to injury.

Judge Dawson, in the case of *Campbell* v. *Tidewater Associated Oil Co.*, 141 F. Supp. 431, held a shipowner liable under the following circumstances, stating at page 434:

> "Where a seaman is expected to ascend or descend from a structure which is 3' in height by the use of a narrow cleat attached to the side of the trunk and with no handhold or rail provided by which he can balance himself, the structure is itself not reasonably fit for the use for which it was intended. As the Court said in Schirm v. Dene Steam Shipping Co., D. C. E. D. N. Y. 1914, 222 F. 587:
>
> > 'If a ladder is set on such a substantial incline that, in order to maintain his equilibrium, the user is compelled to hold himself away from the ladder, then of course, he must have a hand-rail, or something else extending above the ladder, to hold on.' " 222 F. at page 589.

Judge Weinfeld, in the case of *Buch* v. *United States*, 122 F. Supp. 25, aff'd * 220 F. 2d 165, held that it was a breach of warranty of seaworthiness to expose a seaman to the need of traversing an area without the means " * * * to secure a firm foothold * * * " page 27.

Richter had neither a firm foothold nor handhold, but was compelled to perform his duties by climbing onto one metal shelf and holding on to another.

When Richter climbed the slippery steel shelf, standing on one and attempting to hold on to another, he was, obviously, in a precarious and dangerous position.

This danger was the proximate cause, or, at the very least, a substantially contributing factor in causing his fall and resultant injuries.

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* Affirmed except as to amount of maintenance damages.

Richter did not assume the risk of injury when using the only means available to perform his duties.[5]

As to the *Ezekiel* case, our Courts have consistently held a shipowner liable for the failure to provide a seaman with reasonably safe means wherewith to perform his duties.

The latest expression by the United States Supreme Court holding a shipowner liable for its failure to provide a safe and proper tool or appliance is set forth in the case of *Michalic* v. *Cleveland Tanker, Inc., supra.*[6]

As to the Pinto case.

In *Poignant* v. *United States*, 225 F. 2d 595 (2d Cir. 1955), five years before *Mitchell*, this Court held that unseaworthiness liability could arise as to conditions occurring after the onset of the voyage. In a concurring opinion, Judge Frank spelled out liability for a transitory slippery substance, quoting from and adopting Judge Bigg's dissent-

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[5] In the case of *Klimaszewski* v. *Pacific-Atlantic Steamship Co.*, 246 F. 2d 875, at page 877:

"As in Gindville, we say here that one need only refer back to Socony-Vacuum Oil Co. v. Smith, 1939, 305 U. S. 424, 59 St. Ct. 262, 83 L. Ed. 265, to get the rule with regard to the application of the doctrines of assumption of risk and contributory negligence in a maritime case. The extension of the rule stated in the Socony-Vacuum case to longshoremen is shown in Pope & Talbot, Inc. v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, and the Gindville case, supra. The new decision of the Sixth Circuit in Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, certiorari denied, 1956, 352 U. S. 941, 77 S. Ct. 261, 1 L. Ed. 2d 236 is squarely in point * * *."

[6] *The Max Morris*, 137 U. S. 1, 34 L. ed. 586, 11 S. Ct. 29; *The Frank and Willie*, 45 F. 494; *The Julia Fowler*, 49 F. 277; *The Osceola*, 189 U. S. 158, 47 L. ed. 760, 23 S. Ct. 483; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 66 L. ed. 927, 42 S. Ct. 475; *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, 88 L. ed. 561, 64 S. Ct. 455; *Cox* v. *Esso Shipping Co.*, 247 F. 2d 629; *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 4 L. ed. 2d 941, 80 S. Ct. 926.

ing words in *Cookingham* v. *United States*, 184 F. 2d 213, 216, cert. denied 340 U. S. 935, 71 S. Ct. 495 (3rd Cir. 1950):

> "If the stairway was in a condition dangerous for the use for which it was intended, however, 'transitorily,' it was unseaworthy. It remained so while the unsafe condition persisted. The element of time which has intruded itself in this case in both the opinion of this court and that of the court below is irrelevant under the doctrine of the shipowner's absolute liability." (225 F. 2d at 603)

That Judge Frank's concurring decision in *Poignant* was essentially adopted by the Supreme Court in *Mitchell* is clearly indicated in Mr. Justice Harlan's comments in his dissenting opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. at 570-573, 80 S. Ct. 926, and by Judge Medina's reference in *Blier* v. *United States Lines Company*, 286 F. 2d 920, at 924 (2d Cir. 1961).

The composite view as to the correct interpretation of the warranty of seaworthiness was completely disregarded by the Court below, and constitutes a radical and complete departure from the mandate of the Supreme Court, as shown by comparison with the following excerpts treating with this subject:

Seas Shipping Co. v. *Sieracki*, *supra*.

(p. 876, 877):

> "Most often perhaps these have been limitations arising from the erroneous idea that the liability is founded in negligence and therefore may be defeated by the common-law defenses of contributory negligence, assumption of risk and the fellow servant rule. Mahnich v. Southern S.S. Co., supra; cf. Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927."

* * *

"It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. Mahnich v. Southern S.S. Co., supra; Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 S. Ct. 733, 58 L. Ed. 1208, 51 L. R. A., N. S., 1157; Carlisle Packing Co. v. Sandanger, supra. It is a form of absolute duty owing to all within the range of its humanitarian policy."

Cramady v. *The Joachim Hendrik Fisser*, (1959) 358 U. S. 423, 79 S. Ct. 445.

(p. 447, 488):

"And as to appliances the duty of the shipowner does not end with supplying them; he must keep them in order."

• • •

"It was held in Grillea v. United States, 2 Cir., 232 F. 2d 919, that stevedores themselves could render a ship pro tanto unseaworthy and make the vessel owner liable for injuries to one of them."

Mitchell v. *Trawler Racer, Inc., supra.*

(pp. 932, 933):

"The ship is not freed from liability by mere due diligence to render her seaworthy as may be the case under the Harter Act (46 U. S. C. A. §§ 190-195) where loss results from faults in navigation, but under the maritime law there is an absolute obligation to provide a seaworthy vessel and, in default thereof, liability follows for any injuries caused by breach of the obligation." 87 F. 2d at page 741."

• • •

"[3] From that day to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his

duty under the Jones Act to exercise reasonable care. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143; Alaska Steamship Co. v. Petterson, 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798; Rogers v. United States Lines, 347 U. S. 984, 74 S. Ct. 849, 98 L. Ed. 1120; Boudoin v. Lykes Bros. S.S. Co., 348 U. S. 336, 75 S. Ct. 382, 99 L. Ed. 354; Crumady v. The J. H. Fisser, 358 U. S. 423, 75 S. Ct. 382, 99 L. Ed. 354; United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541. There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, or that the duty is any less with respect to an unseaworthy condition which may be only temporary. Of particular relevance here is Alaska Steamship Co. v. Petterson, supra. In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control. That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. That decision also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent."

Michalic v. *Cleveland Tankers, Inc., supra.*

(p. 9):

"The vessel's duty to furnish seamen with tools reasonably fit for their intended use is absolute, Mahnich v. Southern S.S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561; Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760; Cox v. Esso Shipping Co., 5 Cir., 247 F. 2d 629."

Palazzolo v. *Pan-Atlantic S.S. Corp.* (2d Cir. 1954), 211 F. 2d 277, aff'd 349 U. S. 901, 75 S. Ct. 575, reh. gr. and vac. 349 U. S. 926, 75 S. Ct. 769, aff'd 350 U. S. 124, 76 S. Ct. 232.

"Since it is reasonably foreseeable that improper stowage must result in rolls of pulp sliding or 'jumping' and striking someone, the ship would be liable for this accident if the jury found, as it did here, that the accident resulted from improper stowage. La Guerra v. Brasileiro, 2 Cir., 124 F. 2d 553. Proper stowage is an element of seaworthiness. Pioneer Import Corp. v. The Lafcomo, 2 Cir., 138 F. 2d 907. There was ample evidence to support a jury verdict on either or both negligence or unseaworthiness."

Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp. (1956), 350 U. S. 124, 76 S. Ct. 232.

(pp. 237, 238):

"The Court of Appeals has stated that the liability of petitioner in this case is for the performance of its obligation to stow the rolls on board ship 'in a reasonably safe manner.' 211 F. 2d at page 279. That court also has affirmed the decision of the District Court which was based upon the verdict of the jury that petitioner's improper stowage of the rolls produced either the unseaworthiness of the ship, or the hazardous working condition which is the basis for the shipowner's liability to Palazzolo."

Cox v. Esso Shipping Company (5th Cir. 1957), 247 F. 2d 629.

(p. 636):

"This is true even in a claim for unseaworthiness as 'The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery, although it may be relevant in assessing the damages * * *.' concurring opinion of Mr. Justice Frankfurter Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, at page 415, 74 S. Ct. 202, at page 208, 98 L. Ed. 143, at page 154, 1954 A. M. C. 1, at page 11. But the failure of the shipowner to comply with its heavy obligation to select and furnish

seaworthy appliances cannot be thus turned into a fault by the seaman."

Troupe v. *Chicago, D. & G. Bay Transit Co.* (1956), 234 F. 2d 253.

(pp. 259, 261):

"A point is properly preserved when a party has made known his objection to the trial court and stated the grounds on which he bases his objection. Keen v. Overseas Tankship Corp., supra; Irvin Jacobs & Co. v. Fidelity & Deposit Co. of Maryland, 7 Cir., 1953, 202 F. 2d 794, 800-801, 37 A. L. R. 2d 889."

* * *

(Concurring opinion, Judge Frank):

"My colleagues concede that, in an exceptional case, we may review errors not 'saved' by a proper objection. They suggest this is not an exceptional case, relying on a statement in United States v. Atkinson, 297 U. S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555. There the Supreme Court, set forth, in the disjunctive, two grounds for reviewing such errors:

(1) 'the errors are obvious

or

(2) they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.'

My colleagues stress the second ground. But the first ground alone suffices, as the cases make clear. And here, as observed above, the error was magnificently obvious. A litigant surely has the right to assume that a federal trial judge knows the elementary substantive legal rules, long established by the precedents, and that therefore the judge will act

accordingly, without prompting by the litigant's lawyer.[3]"

See footnote "2".

Mere availability of goggles does not meet an employer's obligation of safety to an employee chipping rust and paint under circumstances which but for the use of goggles subjects the employee's eyes to serious injury and possible blindness, as pointed out by the Court of Claims in the case of *Gould* v. *State*, 92 N. Y. S. 2d 251, and authorities therein cited.

Circuit Judge Clark, in his dissenting opinion in *Ezekiel*, *supra*, stated, in part, as follows:

> "These principles control this case. I can see no functional difference between the goggles here and the shield in the hypothetical situation. A dangerous condition was created by the fact that a necessary safety appliance was not employed. There is no dispute that the injury would not have occurred had Ezekiel been wearing goggles. Since he did not use them, the further question whether the goggles were 'reasonably fit for their intended use' does not arise. Goggles were necessary if rust was to be chipped safely; thus the duty to see that they were used was absolute."

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[3] "Because, usually the lawyers alas do not have in hand the judge's charge in writing before he delivers it, they may overlook errors in the charge, until they receive a transcript after the trial is over. This may be especially true if the charge contains an error concerning elementary legal principles which lawyers reasonably assume the judge did not overlook.

Although it is not necessary to sustain my position, I note that particularly here was plaintiff entitled to assume that the judge would pay attention to the legally obvious, since she is a "ward of admiralty", to the protection of whose interests he should have given unusual care."

POINT III

The decision by the Court below is contrary to the clear mandate of the Supreme Court.

That the fact that the decisions by the Court below constitute adoption of minority view as controlling is clearly demonstrated by Judge Clark in his dissenting opinion, concurred in by Judge Smith, in the *per curiam* decision in the petition for a rehearing in *banc* in the *Pinto* case.

The decision by the Court below is in conflict with all prior decisions treating with the question of seaworthiness, the latest two being as follows:

> *Edna Fall, as Admrx of the Estate of Philip Fall* v. *Esso Standard Oil Company* (5th Cir.), decided December 13, 1961, No. 18578 (not officially reported as yet);
>
> *Massa* v. *C. A. Venezuelan Navigacion, etc.* (2nd Cir.), decided January 15, 1962, No. 27059 (not officially reported as yet).

In the *Massa* case, *supra*, decision by Circuit Judges Waterman, Smith and Marshall, the Court stated:

> "The doctrine of unseaworthiness imposes upon a ship owner an absolute duty to furnish a vessel and appurtenances thereto reasonably fit for their intended use. Mitchell v. Trawler Racer, Inc., 362 U. S. 539 (1960). The fact that the stevedoring firm may have supplied the defective appurtenance, here the pallet, does not absolve the vessel owner from liability under the doctrine. Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954); Reed v. The Yaka, 183 F. Supp. 69 (E. D. Pa. 1960). Nor is the fact that the injury occurred on shore a bar to recovery so long as the requisite maritime 'status' or 'relation' is present.

Strike v. Netherlands Ministry of Trade, 182 F. 2d 555 (2 Cir. 1950), cert. denied 341 U. S. 904 (1951); Litwinowicz v. Weyerhaeuser Steamship Co., 179 F. Supp. 812 (E. D. Pa. 1959)."

POINT IV

The Supreme Court's repeated admonitions that "the duty to provide a seaworthy ship—" have been evaded by the alchemy of word transmutation.

Implicit within, and expressed by, all Supreme Court decisions in point, is the clear instruction that no distinction shall be made, based on time, circumstances or causation of an unsafe place to work, aboard ships in navigation.

No lexiphonic or grandiloquent language constitutes a substitute for a shipowner's duty to provide his crew and longshoremen with a reasonably safe place to work. The expediency of giving descriptive names to existing dangers in nowise changes the true facts.

A ship is either seaworthy or not.

Words are but mere sound, whereas seaworthiness is a realistic requirement on which rests the lives and safety of all persons working in maritime service as a means of earning a living.

POINT V

Erroneous and unauthorized judicial legislation by the court below is such as to merit review by the Supreme Court for correction.

The duty to provide a seaworthy vessel has been so modified by the court below that, hereafter, by labelling an unseaworthy condition as a danger inherent, inborn, infixed,

inalienable, intrinsic or other word, such renaming of the unseaworthy condition would be a complete defense for the breach of the warranty of seaworthiness.

This is in direct conflict with the holdings of all prior decisions.

POINT VI.

A new burden of proof has erroneously been established by the court below.

Proof of preventive, separable or alienable nature of unseaworthiness is now required of the accident victim, as further burden of proof, never required heretofore, that is if the holding by the court below, in petitioner Hooper's case, is to be considered good law.

POINT VII.

The court below erroneously made findings of fact in a manner which is in direct conflict with the holding by this Court in the case of *McAllister* v. *United States, supra.*

The trial court in the *Hooper* case herein did not make a finding of "inherent danger".

The uncontradicted evidence was that the manner of affixing the cargo chains, when the cargo was originally loaded, caused a buckling of the deck lumber and created spaces between many piles of lumber. The proof was that these conditions *created* the proximate danger which caused the footing, on which Hooper was working, to suddenly shift and throw him overboard (fol. 231, Hooper Record).

The labelling of such unsafe conditions as "inherent danger" and therefore not unseaworthy, does violence to the true meaning of words in common usage and merits review for correction by the Supreme Court.

Conclusion

Unless further clarification and instruction is given by the Supreme Court, a shipowner's duty, to the crew members on board ship, of providing a reasonable safe place to work, is rendered ineffectual.

The inroads and modification of the duty, if permitted to stand, would invite further dilution, if not complete nullification, of such duty, as exemplified by the following:

1. In the case of petitioner Pinto, by holding that because proof that the condition of the grease, on the narrow stairway, did not show a sufficient length of time to give the shipowner notice of the dangerous condition, the unsafe condition was not unseaworthiness.

2. In the case of petitioner Hooper, he was denied recovery notwithstanding proof that the concededly unsafe place to work, proximately caused his injury, by changing of the condition "unseaworthiness" to the words, "inherent danger".

3. In the case of petitioner Ezekiel, on the holding that the shipowner had exercised due care in providing goggles, concededly none of which were in use by Ezekiel at the time. A foreign particle entered his eye and blinded him while he was chipping rust aboard ship.

4. In the case of petitioner Richter, the absence of a ladder and the need for Richter to stand on a shelf in a narrow closet aboard ship to reach supplies, was held to be a danger assumed by Richter and, therefore, the shipowner was not guilty of breach of warranty of seaworthiness.

Petitioners pray that a writ of certiorari be granted to protect their rights, which have been held by this Supreme Court to be the rights of all crew members and longshoremen engaged in maritime service aboard ships in naviga-

tion. Rights heretofore had by crew members and longshoremen, have been denied all petitioners herein. Rights, as far as all other seamen and longshoremen are concerned, are now in jeopardy of complete nullification unless protected by the granting of the petition for the writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioners.

APPENDIX

Opinions of United States Court of Appeals for the Second Circuit

No. 11—September Term, 1961.

(Petition for rehearing *in banc* submitted November 9, 1961
Decided November 28, 1961.)

Docket No. 26317

RAUL PINTO,
Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,
Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*,

CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL, *Circuit Judges*.

HENRY ISAACSON, New York, N. Y. (Jacob Rassner and Theodore H. Friedman, on the brief), *for plaintiff-appellant*.

PER CURIAM:

The petition for rehearing *in banc* is denied.

CLARK, *Circuit Judge* (dissenting):

Judge Smith's compelling dissent points up a developing problem stemming from discontent with the Supreme Court's expansion of the concept of *unseaworthiness* on the part of those brethren who find themselves in greater sympathy with the views of the dissenters than those of the majority in the quite similar case of *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539. I suggest that a reading of the opinions there, particularly the dissenting opinions, against the opinions herein, will support this conclusion. And the problem is bound to recur often in view of the large number of these cases coming before each panel of our court. The intellectual reaction is understandable, since the minority view was powerfully presented. But whatever we may feel as to the merits of the debate, our duty is surely to apply the presently prevailing law and leave the question of further change to the Court itself. Furthermore, the Court's manifest intent to safeguard human lives at sea and to enforce the shipowner's responsibility by strict liability is not one to combat. But the trend here illustrated toward divergent precedents will make decision increasingly embarrassing for us.

I realize that the *in banc* device represents at best a temporary palliative, rather than the permanent corrective which can be supplied only by the Court itself. But there are now too many cases to expect the Court to act in all these private claims in view of its pressing public obligations. And in our recent past we have employed the *in banc* device to correct decisions not accepted by a majority; indeed, among our inconsistent appearing decisions thereto, the one and only thread, quite obviously, has been its use as such a corrective. Failure to resort to it here to resolve a really troublesome division of view I do think ought to have one advantage, namely in freeing us from the bondage of supporting decisions in which we do not believe. I have always believed that judges must have and do have a mod-

erate degree of freedom in this regard, see, e.g., *Dunbar* v. *Henry Du Bois' Sons Co.*, 2 Cir., 275 F. 2d 304, 306, certiorari denied *Henry Du Bois' Sons Co.* v. *Dunbar*, 364 U. S. 815, though this view seems to have engendered a certain amount of criticism. *Chabot* v. *National Securities and Research Corp.*, 2 Cir., 290 F. 2d 657, 659; Friendly, 109 U. of Pa. L. Rev. 1040, 1045 (1961). Surely we cannot be expected to go contrary to what we believe to be the clear mandate of the Supreme Court by reason of a panel precedent which we thus appear to be powerless to change or modify. But as the more immediate way out of our present self-created dilemma I would vote for deliberation by the entire court.

Judge Smith concurs in this dissent.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 11—September Term, 1961

(Argued September 26, 1961 Decided October 26, 1961)

Docket No. 26317

RAUL PINTO,

Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*,
FRIENDLY and SMITH, *Circuit Judges*.

Appeal by plaintiff seaman from a judgment for defendant, after jury verdict, in the District Court for the Southern District of New York, EDWARD WEINFELD, *Judge*. Affirmed.

THEODORE H. FRIEDMAN (HENRY ISAACSON) (JACOB RASSNER, of counsel; THEODORE H. FRIEDMAN, on brief), New York, New York, for Appellant.

CORYDON B. DUNHAM, New York, New York, for Defendant-Appellee.

FRIENDLY, *Circuit Judge*:

As in *Blier* v. *United States Lines Company*, 286 F. 2d 920 (2 Cir. 1961), cert. denied, — U. S. — (1961), the prin-

cipal issue here is whether the charge of an able District Judge with respect to "transitory" unseaworthiness, given shortly before the decision in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960), accords with the principles there stated by the Supreme Court. Although the question may be closer than in *Blier*, where we sustained Judge Dimock's charge, we find no sufficient basis for distinguishing that decision or, indeed, for coming to any different conclusion apart from it.

Pinto was a seaman aboard the SS. Clovis Victory, a government owned vessel which defendant operated. While the ship was at sea, the third mate directed Pinto and a helper, Fantroy, to carry a heavy signal light from the wheel-house to the engine room for repairs. In descending the ladder leading into the engine room, Pinto slipped and fell, allegedly sustaining a serious injury to his back. The action, in which Federal jurisdiction was predicated upon the Jones Act, 46 U. S. C. § 688, was brought on the "law" side, with a jury trial demanded.

The case was submitted to the jury solely on the basis of unseaworthiness, a claim of negligence having been withdrawn by the plaintiff. The jury found for defendant, and judgment was entered accordingly. Only two of the three theories of unseaworthiness advanced below require consideration here[1]—"operating" unseaworthiness, in that some other method should have been adopted for conveying the light to the engine room, and unseaworthiness based on the alleged presence of grease or oil on the step of the ladder where Pinto slipped. Plaintiff claims error in the charge as to both; we find it in neither.

(1) The judge characterized plaintiff's claim of operating unseaworthiness as going "to the competency of the

[1] The third was that the step on which Pinto fell was worn and slick; no complaint is made with respect to the charge on that score and the fact thus must be taken as established for the defendant by the verdict.

third mate in issuing the instructions to plaintiff and Fantroy to carry the blinker light down the particular stairway and in failing to supervise their activity." He reviewed the testimony of plaintiff's expert "that good seamanship required" that if Pinto and Fantroy were to carry the blinker light down the ladder, "they should have been under the direct supervision of a superior officer," but that in fact "it was unsafe to take anything down as heavy as the light without the aid of a block and fall." He then summarized defendant's evidence that the method was perfectly proper, that indeed "the third mate applied an excess of caution" in supplying a helper, and that the light "well could have been carried down by the plaintiff himself, just as the mate had done earlier." After noting what might seem the anomaly that "this conflict as to an approved and accepted method of carrying the blinker light" should be left to a jury of laymen to resolve, he then made the only remark now criticized:

> "But actually, you are called upon to decide if the third mate was equal in seamanship to the ordinary men of his calling."

Plaintiff claims this to be error since, as he contends, the issue was not the seamanship of the third mate in general but the propriety of the work procedure directed here. There are several answers. The first is that the quoted sentence may not permissibly be taken in isolation; considering the charge as a whole, the jury must have understood that it was to determine the very issue that plaintiff says it should have been allowed to determine. That would be our interpretation even if the portion of the charge concluding in the sentence under attack stood alone; it is still more so in the light of the judge's earlier characterization of Pinto's claim as being "That the third mate was incompetent, in that he should not have instructed or permitted" two men to carry the lamp but should have super-

vised their activity and that "good seamanship dictated" use of a block and tackle—"In short, that the third mate failed to measure up to the standard of his calling, and hence the vessel was unseaworthy." Second, if plaintiff's counsel thought the jury might apply the remark now criticized in a manner different from what he believed proper, it was his duty to call the point to the judge's attention; this he did not do. Finally, the charge which plaintiff asserts should have been and, in our view, was given, was more favorable than the law warrants. Gilmore and Black, The Law of Admiralty (1957), 320, say that "The only case which is today clearly outside the scope of the unseaworthiness doctrine is [ ] an injury whose only cause is an order improvidently given by a concededly competent officer on a ship admitted to be in all respects seaworthy," citing *The Osceola*, 189 U. S. 158 (1903), *Chelentis* v. *Luckenbach SS. Co.*, 247 U. S. 372 (1918), and *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4 (6th Cir. 1956). Here, of course, the ship was not "admitted to be in all respects seaworthy," but if the other claims of unseaworthiness were determined in favor of the defendant on proper instructions, the same result must follow. On that view, plaintiff, under his claim of "operating" unseaworthiness, was entitled to raise only the mate's overall competence; to the extent that the judge went beyond that, as we think he did, it was the defendant who was entitled to complain.

(2) The evidence whether there was grease or oil on the step was in sharp conflict. The Chief Engineer had found none, either at 1:15 P. M., some forty-five minutes before the accident, or immediately thereafter. The First Assistant Engineer testified that the ladder was constructed of grating, for the precise purpose of keeping any accumulation of oil to a minimum; that the steps had been thoroughly cleaned shortly before noon; and that on an inspection right after the accident, he had found no oil or grease. The Chief Mate, who inspected the ladder a half hour after

Pinto's fall, found "the step was absolutely dry"; [2] he had never seen a film of oil on the stairway though he had visited the engine room once or twice daily. As against this, Pinto insisted that he had noticed grease on the step after the injury, and Fantroy corroborated this.

After reviewing the evidence the judge charged as follows:

> "Unseaworthiness is a relative concept, dependent in each instance upon the circumstances in which the ship's fitness is drawn in question. In deciding this issue you will of course bear in mind that the accident occurred on the ladder leading to and from the engine room, where the use of oil and grease is required for normal engine room functioning. In this circumstance, the mere momentary presence of oil in the area does not in and of itself render the vessel unseaworthy. Before you can find that the vessel was unseaworthy plaintiff must satisfy you by a fair preponderance of the evidence that the alleged condition of oil or grease, which he claims caused him to slip, was not a momentary phase in the normal progress of work in and about the engine room, but that oil and grease was permitted to accumulate in sufficient quantity so that the vessel was rendered unseaworthy. In other words, it is not required that the vessel have a crew member handy with a rag to wipe off oil the very minute it is placed in an area. A vessel does not become unseaworthy by reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service. The essential test is whether, considering place and circumstance, the area was reasonably fit to permit

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[2] The Third Assistant Engineer testified that no one had wiped anything from the steps before the inspection.

> Pinto to perform his tasks with reasonable safety. Absolute perfection is not required under the doctrine of seaworthiness. It requires reasonable fitness for intended use."

Plaintiff's counsel excepted on the basis that the judge had charged "in line with the Cookingham decision, that a transitory condition would not impose liability," whereas in fact "whether it was transitory or not wouldn't make any difference on a charge of unseaworthiness."[3]

The judge's statement that "A vessel does not become unseaworthy by reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service" and the sentences continuing to the end of this portion of the charge are substantially equivalent to what we sustained in *Blier v. United States Lines Company, supra.* If a different result is to be reached here, it must be on the basis of the judge's earlier statement that "the mere momentary presence of oil in the area [the engine room] does not in and of itself render the vessel unseaworthy" and the two sentences immediately following. To use these are no more than a permissible application of the later general statements to

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[3] At the same time oral request was made for a charge "that if the physical condition as it existed at that precise time was not reasonably safe for carrying down a particular blinker light, then they should not be concerned with whether or not the condition was created just a few minutes before or a long time before." The Court declined to grant this "for the reason that counsel were asked to submit requests for instructions under the rules and no such request was submitted." This was proper; the judge is entitled to an opportunity to study written requests in advance of his own charge and ought not be obliged to act on oral ones after his charge has been given. F. R. Civ. Proc. 51; *Dallas Ry. & Terminal Co. v. Sullivan*, 108 F. 2d 581, 584 (5 Cir. 1940); *Secraty v. Philadelphia Coca-Cola Bottling Co.*, 198 F. 2d 264 (3 Cir. 1952); *Tuener Construction Co. v. Houlihan*, 240 F. 2d 435 (1 Cir. 1957). Moreover, the request went too far, for reasons later pointed out.

the particular facts. The charge seems to be good sense, and we are not persuaded that *Mitchell* makes it bad law,—especially when the judge followed the remarks now criticized by saying that "The essential test" was almost precisely what Mr. Justice Stewart was to say two months later, 362 U. S. at 550.

In *Mitchell* the judge had told the jury that unseaworthiness is "quite similar to negligence" and summed up, 362 U. S. at 540-541, fn. 2:

> "Was there something there and was it there for a reasonably long period of time so that a shipowner ought to have seen that it was removed? That is the question."

The jury could well have regarded that question as containing negligence connotations, and the liklihood that they were intended to do exactly that was emphasized by the refusal of a request "to instruct the jury that notice was not a necessary element in proving liability based upon unseaworthiness of the vessel," 362 U. S. at 541. Indeed, the judge himself later described his charge as having been "that the plaintiff could not recover unless the slime had been on the rail long enough for the shipowner to be chargeable with knowledge of it,"—an instruction which, on reflection, he considered to be possibly "inappropriate with respect to the unseaworthiness count" save for special circumstances as to who had been responsible for the slime getting on the rail, 167 F. Supp. 434 (D. Mass. 1958).[4] The Court of Appeals, characterizing the charge "as requiring proof of the presence of the unseaworthy condition for a sufficient length of time, from which the inference might be drawn that defendant, or his servants, in the exercise of due

[4] The Supreme Court rejected this justification as having "played no part in the issues developed at the trial." 362 U. S. at 542-543, fn. 4.

care, ought to have discovered the presence of the slimy substance and removed it," approved it on the very basis as to which Judge Wyzanski had become doubtful, namely, that in the case of "an unseaworthy condition which arises only during the progress of the voyage . . ." the shipowner's obligation is merely to see that reasonable care is used under the circumstances . . . by him . . . incident to the correction of the newly arisen defect." 265 F. 2d 426, 427, 432 (1 Cir. 1959). This was the posture in which the case was presented to the Supreme Court.

The Supreme Court thus regarded the case as presenting "the single issue whether with respect to so-called 'transitory' unseaworthiness the shipowner's liability is limited by concepts of common law negligence." 362 U. S. at 542. The context, as well as the term "so called," makes it plain that the Court was using "transitory," not in a general sense, but in the special one of what the Court of Appeals had called "an unseaworthy condition which arises only during the progress of the voyage," 362 U. S. at 542, whether of short or long duration, as distinguished from a condition existing at the voyage's inception. That "single issue," previously much debated in the Court of Appeals, see 362 U. S. at 542, the Supreme Court settled in the negative. However, in giving a negative answer to the question thus posed and enunciating "a complete divorcement of unseaworthiness liability from concepts of negligence," 362 U. S. at 550, the Court was at pains to make clear that it was not going to the extreme of requiring any such absolute freedom of all parts of a vessel from all foreign substances at all times, as, for example, Interstate Commerce Commission Rule 43 under the Boiler Inspection Act, 45 U. S. C. § 23, has been held to demand with respect to locomotives and tenders. *Lilly v. Grand Trunk Western R.R.*, 317 U. S. 481, 487-488 (1943); *Calabritto v. New York, N. H. & H. R.R.*, 287 F. 2d 294 (2 Cir.), cert. denied, 366 U. S. 928 (1961). When Mr. Justice Stewart

said, as to a vessel whose rail was claimed to have been coated with slime and fish gurry, "* * * the owner is not obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use." 362 U. S. at 550, and remanded the case "for a new trial on the issue of unseaworthiness," we do not think he meant that the mere presence of the slime and gurry, surely as much of a hazard as the alleged oil or grease here, would automatically lead to liability. If the Supreme Court had intended that the only issue to be open on remand was the presence or absence of the slime and gurry, that would have been easy to say.

The Court's decision that it was inconsequential, as a matter of law, that the dangerous condition did not arrive until a moment after the sailing did not logically carry with it a conclusion that it was similarly inconsequential, as a matter of fact, that the condition arose only a moment before the accident: whether such a momentary condition would or would not render the vessel unseaworthy would be for the trier of the facts to say. The statement at p. 550, that *Alaska Steamship Co. v. Petterson*, 347 U. S. 396 (1954), "also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent" must be read along with the immediately preceding one that the *Alaska Steamship* "decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability." A conclusion that liability for a temporary condition is not different in legal nature from liability for a permanent one does not mean that the duration of the condition, the measures prescribed for dealing with it, and the feasibility of achieving perfect safety at all times, are irrelevant to deciding whether the owner had met his obligation to furnish "a vessel reasonably suit-

able for her intended service." 362 U. S. at 550. *Poignant v. United States*, 225 F. 2d 595 (2 Cir. 1955), cited with approval in *Mitchell*, 362 U. S. at 550, n. 12, see also p. 542, had said that a vessel "does not become unseaworthy by reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service," p. 598, and even Judge Frank's concurring opinion conceded, p. 602, "that, if defendant were to prove that there were no means, reasonably available, to keep the passageway free of garbage, the existence of the dangerous condition would not have constituted unseaworthiness."

As indicated in *Isbor v. United States Lines Company*, *supra*, at 923, we thus read *Mitchell* as holding that the trier of the facts is to determine whether the emergence and temporary continuance of a slippery or other hazardous condition does or does not leave a vessel "reasonably suitable for her intended service," 362 U. S. at 550, on the evidence in the case and under the standards of the trade; if that question is answered in the negative, it is then no defense either that the condition had come into existence only during the voyage or, if it had, that it had not existed "for a sufficient length of time, from which the inference might be drawn that defendant, or his servants, in the exercise of due care, ought to have discovered" its presence, 265 F. 2d at 427.

If our understanding of *Mitchell* is correct, Judge Weinfeld's charge conformed to it. The charge cannot fairly be read as importing notions of common-law negligence into the jury's determination of unseaworthiness. Earlier the judge had instructed that "even the exercise of diligence or reasonable care does not relieve the shipowner of the duty to supply a seaworthy vessel"; although "the standard to be applied is not absolute perfection, but only reasonable fitness for intended use." His remarks about the special nature of an engine room, and the lack of any requirement that the vessel have a crew member in constant

readiness to wipe off the most minute accumulation of oil were designed to clarify the meaning of this standard as applied to the case in hand. Nowhere did he suggest that plaintiff must prove that defendant's supervisory personnel knew or ought to have known that oil or grease had accumulated.[5] He left it to the jury to determine "whether, considering place", to wit an engine room, "and circumstances", that is, the evidence as to the special design of the steps "to prevent the accumulation of foreign substances", the practice of cleaning the steps, and the absence of oil or grease shortly before the accident, "the area was reasonably fit to permit Pinto to perform his tasks with reasonable safety."[6] If it be said that a jury inexpert in the ways of engine rooms cannot be expected to determine how much oil, if any, can be tolerated on a step and for how long, without the ship becoming unseaworthy thereby, we answer, much as Judge Medina did in *Blier v. United States Lines Company, supra*, at 926, that this is the kind of thing juries determine all the time. True, the task would be simpler if the jury had only to decide whether a foreign substance was present, but, as we read *Mitchell*, that is not the standard laid down by the Supreme Court.

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[5] In fact, there was no evidence as to when the grease alleged to have been on the ladder had gotten there. Pinto and Fantroy did not know, and defendant's witnesses denied there was any.

[6] The charge differed essentially from that disapproved in *Grzybowski v. Arrow Barge Co.*, 283 F. 2d 481 (4 Cir. 1960), distinguished in *Blier v. United States Lines Company, supra*, at 926, where the judge had instructed the jury to consider the absence of previous complaint by the plaintiff or request for corrective action by the ship; we agree with the decision on that basis, although the opinion contains some language with which we do not. Similarly the decision in *Puerto Seguro Cia. Naviera, S. A. v. Pitsillos*, 279 F. 2d 599 (4 Cir. 1960), is not opposed to our view of *Mitchell*, although certain of the language is; the Court of Appeals simply sustained a permissible finding of unseaworthiness by a judge as trier of the facts.

Moreover, if the charge were subject to any criticism, we doubt whether the exception was apt to raise it. More specific objection was needed to raise a contention that it was an invasion of the jury's province for the judge to state that the vessel need not "have a crew member handy with a rag to wipe off oil the very minute it is placed in the area", etc.; a contention with which we do not agree. The exceptions that were made were not well taken. The judge had not charged in line with *Cookingham*, 184 F. 2d 213 (3 Cir. 1950), cert. denied, 340 U. S. 935 (1951), as counsel claimed, but with this Court's decision in *Poignant*, 225 F. 2d at 597-598, which had disapproved *Cookingham*, as so experienced a judge well knew. Neither was there foundation for the accusation that the judge said "a transitory condition would not impose liability", whereas "whether it was transitory or not wouldn't make any difference on a charge of unseaworthiness." Insofar as this meant "transitory" in the technical sense of "post-inception", the charge had been just the opposite of that claimed; and if the more general sense of "momentary" was meant, the judge had said, quite correctly on our reading of *Mitchell*, that a momentary condition would not impose liability automatically and that the jury was to take the duration of the condition and the feasibility of more complete prevention into whatever account it found appropriate. The same considerations show that counsel's improperly submitted oral request was, on its merits, too broad.

Complaint is also made with respect to certain interrogation with respect to plaintiff's sex activities; this was not improper in the light of statements in the hospital record that had been received in evidence at plaintiff's instance.

Affirmed.

SMITH, *Circuit Judge* (dissenting):

I respectfully dissent, and would reverse on the ground that the charge did not fully anticipate the later *Mitchell* definition of the extent of the duty to provide a seaworthy ship. The charge here has not applied the same standards to a temporary condition as to a permanent one.

In *Blier* v. *United States Lines Company*, 286 F. 2d 920 (2 Cir. 1961), cert. denied — U. S. — (1961), there was, to be sure, mention of a temporary condition, but no indication that the test of seaworthiness was different from that for a permanent condition. Here, the charge makes a distinction absolving the shipowner from liability "if a momentary phase in the normal progress of work", and holds that "it is not required to have a crew member handy with a rag to wipe off oil the very minute it is placed in an area." This seems to me to import a time element into the concept of seaworthiness which time element was rejected by the Supreme Court in *Mitchell* v. *Trawler Racer, Inc.* (1960), 362 U. S. 539. If grease was on this step in a quantity sufficient to make it unfit for use by plaintiff, and he was injured thereby, the damage suffered falls under the *Mitchell* doctrine upon the ship, not the seaman. It makes no difference whether the grease was there seconds or hours, for the liability is imposed because the ladder was unfit for use, regardless of fault, as a means of distributing the risks of the calling. See Harlan, *J.*, dissenting in *Mitchell*, 362 U. S. 539 at 572.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 11—September Term, 1961.

Docket No. 26317.

RAUL PINTO,

Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*, FRIENDLY and SMITH, *Circuit Judges*.

ORDER MODIFYING OPINION

It is ordered, of the Court's own motion, that the opinion herein filed October 26, 1961, be modified by making the following changes on p. 39 of the slip opinion:

Lines 9-11—Strike out from "When" through "gurry", and substitute "The Court said,"

Line 15—Substitute a period for the comma at the end of the quote and strike out from there to the end of the paragraph.

Then insert:

> What was the question the jury was to try on the remand? Clearly it was not the mere presence or absence of slime and gurry on the rail—if the Supreme Court had meant that, it would have said so. Appellant urges it was whether slime and gurry

were present and their presence rendered the ship unseaworthy. In one sense that is so; but what was the jury to consider in answering the latter half of the question? Most jurors would see a difference in the seaworthy condition of a vessel whose rails had been left coated with slime and gurry for hours, and of another, generally spick-and-span, on which a mishap had suddenly created a slippery condition. Must they be told that this distinction, relevant in common sense, is irrelevant in law? So here, assuming the engine room steps were so constructed as to keep the hazard of oil accumulation to a minimum, most jurors would see a difference in seaworthiness as between a vessel whose well-constructed steps bore the oil accumulation of days and another whose similar steps had only a film of oil unavoidably accumulated since a cleaning a few hours before. We read Mitchell as saying they may nevertheless hold the owner liable in the latter case, not that they must. What Mitchell did forbid was the Court's instructing them to make any distinction based on whether the condition had or had not arisen until the voyage commenced, or on whether it had or had not been brought home to the owner. The duty may be no "less with respect to an unseaworthy condition which may be only temporary", 362 U. S. at 549, but the question remains whether such a temporary condition in fact renders the vessel "not reasonably suitable for her intended service", 362 U. S. at 550.

In the second line of the following paragraph change "arrive" to "arise".

J. E. L.,
U. S. Chief Judge.
H. J. F.,
U. S. C. JJ.

1 November 1961.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 63—September Term, 1961

(Argued November 8, 1961 Decided November 24, 1961)

Docket No. 27003

—o—

GEORGE HOOPER,

Plaintiff-Appellant,

against

TERMINAL STEAMSHIP COMPANY,

Defendant-Appellee.

—o—

Before:

LUMBARD, *Chief Judge*,
MEDINA and WATERMAN, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, David N. Edelstein, *Judge*.

Plaintiff, a longshoreman, appeals from a judgment dismissing his complaint on findings of lack of proof of negligence by the shipowner and lack of proof of unseaworthiness of the vessel, after a non-jury trial, in an action to recover damages for injuries sustained when the cargo of lumber on which he was standing shifted and he lost his balance and fell overboard. Opinion below not reported. Affirmed.

THEODORE H. FRIEDMAN, New York, N. Y. (JACOB RASSNER, New York, N. Y. on the brief), for plaintiff-appellant.

ROBERT M. PELLEGRINO, New York, N. Y. (DOUGHERTY, RYAN, MAHONEY & PELLEGRINO and ALBERT D. KOCH, New York, N. Y., on the brief), for defendant-appellee.

PER CURIAM:

George Hooper was a longshoreman engaged in the discharge of a deck cargo of lumber from the S.S. "Lumber Carrier," at Bridgeport, Connecticut, on June 27, 1954. He appeals from a judgment, after a non-jury trial, dismissing his complaint in an action against the shipowner based on alleged negligence and unseaworthiness. The deck cargo had been partly unloaded and Hooper and his work partner were making up another draft of lumber to be hoisted off the vessel. While engaged in this operation the remainder of the deck cargo of lumber shifted under his feet and he lost his balance and fell overboard, sustaining the injuries complained of. The evidence gives ample support to the findings that the cargo was properly stowed and that no railings were customarily used or could be used around the deck cargo during the unloading of the lumber. As the shifting of the cargo is a condition inherent in the operation of unloading a deck cargo of lumber, the trial judge properly ruled that there could be no recovery in the absence of proof of improper stowage. This is in accord with our decisions in *Blier* v. *United States Lines Company*, 2 Cir., 1961, 286 F. 2d 920, and *Pinto* v. *States Marine Corporation of Delaware*, 2 Cir., 1961, decided October 26, 1961, which applied the teaching of *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, to the effect that the doctrine of seaworthiness requires no more than reasonable fitness for intended use. This doctrine has been repeatedly applied to transitory conditions arising during the operation and unloading of the vessel.

There is nothing to the contrary in *Carabellese v. Naviera Azua, S.A.*, 2 Cir., 1960, 285 F. 2d 355, cert. denied, 1961, 365 U. S. 872. Moreover, *Reddick v. McAllister Lighterage Line, Inc.*, 2 Cir., 1958, 258 F. 2d 297, cert. denied, 358 U. S. 908; *Grilled v. United States*, 2 Cir., 1956, 232 F. 2d 919; *Rich v. Ellerman & Bucknall S.S. Co.*, 2 Cir., 1969, 278 F. 2d 704, and other cases cited by appellant are distinguishable.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 44—September Term, 1961.

(Argued October 31, 1961 Decided December 15, 1961.)

Docket No. 26937

GEORGE EZEKIEL,

Plaintiff-Appellant,

against

VOLUSIA STEAMSHIP CO. and SUWANEE STEAMSHIP CO.,

Defendants-Appellees.

Before:

CLARK, HINCKS and FRIENDLY,

Circuit Judges.

Plaintiff appeals from a judgment of the District Court for the Southern District of New York, John W. Holland, *J.*,* in favor of defendant in a seaman's personal injury action. Affirmed.

THEODORE H. FRIEDMAN, New York, New York (Jacob Rassner), *for Plaintiff-Appellant.*

ARTHUR M. BOAL, JR., New York, New York (Boal, McQuade & Fitzpatrick), *for Defendants-Appellees.*

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* Of the Southern District of Florida, sitting by designation.

FRIENDLY, Circuit Judge:

Plaintiff, a Honduran seaman, brought this action in 1957, in the District Court for the Southern District of New York, against a Liberian corporation[1] for an injury to his eye suffered while he was chipping rust aboard M/V Arctic Reefer, a Liberian vessel, in Guatemalan waters. The action was brought on the "law" side, and a jury trial was demanded. In the spring of 1961, plaintiff consented to a transfer to the "admiralty" side, withdrew the claims asserted for maintenance and cure and for negligence under the Jones Act, 46 U. S. C. § 688, and agreed to proceed solely on a theory of unseaworthiness. It was stipulated that liability was governed by Liberian law and that Liberia has adopted the nonstatutory general maritime law of the United States.

Plaintiff's evidence on the issue of liability consisted of his own deposition and the testimony of a Captain Mandrill, called as an expert. Shortly after 8 A.M. on May 19, 1956, plaintiff began to chip rust, with a hammer, from a blower on the top of the deck above the engine room. About an hour later a piece of rust flew off and hit his right eye. He was not wearing goggles. He claimed that he had none, that the boatswain kept them, that he had asked the boatswain for some before starting work, and that the boatswain claimed to have no more. He was unable to recall the name of the boatswain, although he had been on the ship for almost a year. Mandrill testified it was bad practice for a boatswain to allow a seaman to chip rust without wearing goggles.

Defendant introduced the deposition of Bodden, the Arctic Reefer's chief officer. His testimony was that each of the seven members of the deck crew, including Ezekiel, had been issued a pair of goggles in March and had been informed that if "at any time the goggles should be lost or

[1] Claims against defendant Suwanee SS. Co. were discontinued.

injured it was their duty to report in order for replacement of a new pair"; that a notice was posted to this effect, stating also that replacements were to be obtained from the chief officer; that, pursuant to a written order from the company, he kept six spare sets of goggles in a locker in his office; that it was the custom on the ship for men to come to him for supplies so maintained; but that Ezekiel had never sought a replacement for his goggles. Bodden testified also that, on two previous occasions, one about a month and the other about a week before the injury, he saw Ezekiel chipping rust with goggles around the neck but not on the eyes, and remonstrated about this; Ezekiel promised to be careful on the first occasion and made no answer on the second. After the accident Bodden asked Ezekiel whether he had his goggles on; Ezekiel answered "No." Bodden asked why, but got no reply.

In giving judgment for the defendant, Judge Holland found, in an opinion delivered at the close of the trial, "that goggles for the prevention of injuries to the eye to be used by a crew member in the chipping of rust were a part of the maintenance of the vessel in question required by the standard of seaworthiness," "that in connection with the performance of a chipping of rust operation, seaworthiness requires the making of goggles available to the crew member who is ordered to perform such an operation," and "that the evidence in the case demonstrates that both of those duties which I have outlined heretofore as to seaworthiness have been met by the respondent." The judge declined a request by plaintiff's counsel to consider more detailed findings and conclusions which counsel wished to prepare.

Reading the findings together as we must, the last quoted finding means at least that the judge had determined, as he was amply warranted in doing, that goggles had been issued to plaintiff, that plaintiff had been instructed to come to the chief officer for a replacement if they

were lost or damaged, and that replacements were available. It could mean also that the judge completely discredited plaintiff's story about the unsuccessful request to the anonymous boatswain, or even that the judge thought plaintiff had the goggles with him but failed to put them on, as, according to Bodden, he had failed twice before. The judge would have been entitled to come to any of these conclusions although plaintiff was not before him, in view of the contradictions between plaintiff's and Bodden's versions of the goggle situation, see *Noland* v. *Buffalo Ins. Co.*, 181 F. 2d 735, 738 (8 Cir. 1950). Even if the judge did not intend any finding on the truth of plaintiff's story, we could supplement his findings by ourselves weighing plaintiff's testimony against Bodden's; indeed, we could do this even if this appeal were one governed by the Federal Rules of Civil Procedure rather than by the Admiralty Rules, see *Westley* v. *Southern Ry.*, 250 F. 2d 188 (4 Cir. 1957); *Burman* v. *Leukin Const. Co.*, 149 F. 2d 827 (D. C. Cir. 1945); *cf.* 5 Moore, Federal Practice (1951), § 52.04, However, it is unnecessary for us to supply such additional findings or to remand to the district judge, since even without them the judgment must be affirmed.

At the outset, it is clear that a ship is not rendered unseaworthy simply because rust accumulates and has to be removed, see *Lind* v. *American Trading & Production Corp.*, 294 F. 2d 342 (9 Cir. 1961). Nothing was shown to be wrong in the quantity or quality of the ship's gear, we have already noted that the judge's findings, supported by the evidence, mean at least that goggles had been issued and that an adequate number of spares were maintained and were available to the crew for proper purposes. The evidence did not require a finding of a deficiency in the ship's procedure with respect to the use of goggles; the judge was not bound to accept the opinion of plaintiff's expert that good procedure requires that boatswains take affirmative action to see to it that crewmen, who have been furnished goggles and instructed to wear them, do so at

all times. Even if plaintiff's testimony were to be taken at face value, it did not compel the judge to find that the single alleged misfeasance by the boatswain made him not "equal in disposition and seamanship to the ordinary men in the calling." *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 518 (2 Cir.), cert. denied, 343 U. S. 966 (1952); *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U. S. 336 (1955). The only remaining basis of liability would be the boatswain's alleged action standing by itself. But we have just reaffirmed, without disagreement on that point, that allegedly imprudent action by a seaman's superior is not within the concept of unseaworthiness even though it may be within that of negligence, *Pinto* v. *States Marine Corporation of Delaware*, ——F. 2d —— (2 Cir. 1961), petitions for rehearing and rehearing *in banc* denied, Nov. 20, 1961, as was held long ago in *The Osceola*, 189 U. S. 158 (1903), and *Chelentis* v. *Luckenbach SS. Co.*, 247 U. S. 372 (1918), and recently in *Imperial Oil Ltd.* v. *Drlik*, 234 F. 2d 4 (6 Cir. 1956); *Penedo Cia Naviera S.A.* v. *Maniatis*, 262 F. 2d 284 (4 Cir. 1959); and *Lind* v. *American Trading & Production Corp., supra*; see Gilmore & Black, The Law of Admiralty (1957), 320, and Judge Learned Hand's discussion in *Grillea* v. *United States*, 232 F. 2d 919, 922 (2 Cir. 1956). Liberia has chosen not to adopt United States statutory law making negligence as well as unseaworthiness a ground for recovery; it is not for us to force that upon her. Since the judge below found the claim of unseaworthiness not proved, there was of course no occasion for him to make findings on the issue of contributory negligence or to apportion damages, as would have been required in the event of a contrary conclusion as to unseaworthiness.

Affirmed.

CLARK, *Circuit Judge* (dissenting):

The undisputed testimony established that plaintiff, an 18-year-old seaman, was chipping rust with a hammer from a blower on the ship's deck; that he was not wearing goggles; and that as a result of this failure a piece of rust hit his right eye. Plaintiff's expert witness, Captain Mandrill, testified that chipping is "hazardous" and that the wearing of goggles is necessary in such an operation. He further stated that a good boatswain who observed a man chipping rust without goggles would make him put them on. At trial, Judge Holland found that a ship must provide crew members chipping rust with "goggles for the prevention of injuries to the eye" in order to meet the standard of seaworthiness. Nevertheless he found that this duty had been met, and accordingly gave judgment for defendant. The question on this appeal is whether defendant's steps taken to provide goggles excuse it from liability for unseaworthiness.

It seems very difficult for courts to accustom themselves to the strict liability of unseaworthiness, perhaps because it is cut on such a different pattern than the familiar negligence action. The duty it creates is absolute; the exercise of due care will not discharge this obligation. If an injury occurs as a result of an unseaworthy condition it matters not what efforts the defendant took, or might have taken, to avoid the injury. Blameless he may be; nevertheless he is liable. *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Van Carpals v. S.S. American Harvester*, 2 Cir., Dec. 13, 1961. He is liable even if the unseaworthy condition is created by the negligence of the plaintiff. *Grillea v. United States*, 2 Cir., 232 F. 2d 919, 923. As Judge Learned Hand said in that case: "It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct in whole or in part. However, there is in this nothing

inconsistent with the nature of the liability because it is imposed regardless of fault; to the prescribed extent the owner is an insurer, though he may have no means of learning of, or correcting, the defect. Indeed as to these it is a kind of 'Workmen's Compensation Act'; though limited by the value of the ship and by the fact that it only covers injuries caused by the defects that we have mentioned." Hence the sole question before us is whether an unseaworthy condition existed and caused the plaintiff's injury.

Liability for failure to furnish a seaworthy vessel is absolute, but a vessel need not be accident-free to be "seaworthy." Liability for injuries caused by the vessel and its appurtenances accrues only when the owner has failed to furnish a vessel and appurtenances "reasonably fit for their intended use." *Mitchell* v. *Trawler Racer, Inc., supra,* 362 U. S. 539, 550. On the other hand, this does not mean, as my brothers seem to believe, that he must make only reasonable efforts to furnish seaworthy appliances. He has an absolute duty to furnish a reasonably fit ship.

My brothers accept the proposition that a vessel is not seaworthy unless goggles are provided for tasks such as were here involved. Nevertheless they believe that the ship and its appurtenances were "reasonably fit for their intended use," apparently because steps were taken to make the goggles available. This view confuses the nature of the obligation, however, because it suggests that liability is limited to defendant's negligence. It seems to be an attempt to introduce negligence concepts by the back door, as it were, utilizing the rule that seaworthy ship and its appurtenances need only be "reasonably fit for their intended use" to evade the Supreme Court's repeated admonitions that "the duty to provide a seaworthy ship depends not at all upon the negligence of the shipowner or his agents." *Mitchell* v. *Trawler Racer, Inc., supra,* 362 U. S. 539, 548. See also *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406; *Alaska S.S. Co.* v. *Petterson,* 347 U. S. 396; *Rogers* v.

United States Lines, 347 U. S. 984; *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U. S. 336.

If the fact that a seaman is not wearing goggles while engaged in rust-chipping is itself an unseaworthy condition, the defendant is liable, whatever steps it took, unsuccessfully, to see that they were worn. The precise question whether such a condition is unseaworthiness has never been decided, but the guiding principles are clear. Failure to provide an appliance necessary for safe completion of shipboard operations will render a ship unseaworthy. *Poignant* v. *United States*, 2 Cir., 225 F. 2d 595; *The T. J. Hooper*, 2 Cir., 60 F. 2d 737, certiorari denied *Eastern Transportation Co.* v. *Northern Barge Corp.*, 287 U. S. 662. See also dissenting opinion of Harlan, J., *Mitchell* v. *Trawler Racer, Inc.*, *supra*, 362 U. S. 539, 576. If safe appliances are available, moreover, but due to the negligence of plaintiff or a co-worker they are not used, the vessel may thereby be rendered unseaworthy. *Grillea* v. *United States*, *supra*, 2 Cir., 232 F. 2d 919. And the doctrine is not limited to instances of initial unseaworthiness, but applies to transitory conditions arising in the course of the ship's operations. *Mitchell* v. *Trawler Racer, Inc.*, *supra*, 362 U. S. 539.

If a ship furnishes an appliance which cannot be used in a normal manner without a safety device or without certain precautions being taken, then if the device is not furnished or the precautions not taken, the ship is unseaworthy. *Krey* v. *United States*, 2 Cir., 123 F. 2d 1008 (shipboard shower without handle); *Campbell* v. *Tidewater Associated Oil Co.*, D. C. S. D. N. Y., 141 F. Supp. 431 (tank with cleats for climbing, but not handrails). Thus, for example, if a ship had on it a pump which sprayed acid in the course of its use, so that it could be safely used only if a movable plastic shield were placed over it, the ship would be unseaworthy if no shield were installed. Even if there were a shield, but the pumpman negligently set

it aside, the shipowner, it would seem clear, would be liable if as a result the pumpman was injured.

These principles control this case. I can see no functional difference between the goggles here and the shield in the hypothetical situation. A dangerous condition was created by the fact that a necessary safety appliance was not employed. There is no dispute that the injury would not have occurred had Ezekial been wearing goggles. Since he did not use them, the further question whether the goggles were "reasonably fit for their intended use" does not arise. Goggles were necessary if rust was to be chipped safely; thus the duty to see that they were used was absolute.

The doctrine of unseaworthiness imposes strict liability in order to promote the taking of greater precaution at sea, because such liability is considered necessary to protect seamen against the special hazards and conditions of maritime service and because the owner "is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost." *Seas Shipping Co.* v. *Sieracki*, *supra*, 328 U. S. 85, 94. Liability here fosters all these ends. I must therefore disagree with Judge Holland and my brethren, and hold the ship unseaworthy under current statements of that principle. The judgment should be reversed and the action remanded for the award of damages.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 86—September Term, 1961.

Submitted November 9, 1961.

Decided December 26, 1961.

Docket No. 26592

GEORGE RICHTER,

Libelant-Appellant,

—v.—

MATHIESEN'S TANKER INDUSTRIES, INC., and S.S. MICHAEL J., her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents-Appellees.

Before:

LUMBARD, *Chief Judge*,
MEDINA,
WATERMAN, *Circuit Judges*.

Libelant appeals from a decree adverse to him entered in the United States District Court for the Southern District of New York, after a hearing before Noonan, *J.*, sitting in admiralty without jury. Decree below affirmed.

JACOB RASSNER, New York City, for Libelant-Appellant.

CICHANOWICZ & CALLAN (VICTOR S. CICHANOWICZ, of counsel), New York City, for Respondents-Appellees.

PER CURIAM:

Libelant appeals from a decree in admiralty adverse to him and claims that the trial judge, who tried the case without jury, erred in that he found the S.S. *Michael J.* not to have been unseaworthy.

The court below found that the libelant, while checking an inventory of spare parts that were stored on shelves in a small storeroom located off the engineroom, stood on a metal shelf about one foot off the deck in order to reach an upper shelf with his right hand, steadied himself with his left hand, and somehow fell from this position and landed on the deck, injuring himself. There was no oil or dirt on the floor of the storeroom, and at trial the libelant, to support his claim of unseaworthiness, sought to prove that there should have been a ladder available that he could have used. On appeal, libelant also asserts in his brief that the metal shelf was slippery, a claim that does not appear to have been made at trial.

The court below found that the use of a ladder in this small storeroom would not have been feasible.

We have reviewed the material presented to us on appeal, and approve the findings of fact and conclusions of law of the trial judge. A small sized storeroom having a top shelf beyond easy arm's reach does not create an unsafe place to work, nor does the existence of such a storeroom on a merchant vessel cause that vessel to be unseaworthy. The fact that on a vessel an accident occurred and a seaman was injured in the course of his duties does not, without more, prove that the vessel was unseaworthy. We conclude, as the judge below concluded, that the libelant has produced no credible evidence whatever to support his claim of unseaworthiness.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and sixty-one.

Present:

HON. EDWARD J. LUMBARD,
Chief Judge.

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

RAUL PINTO,

Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYES,
HON. THURGOOD MARSHALL,
Circuit Judges.

RAUL PINTO,
Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,
Defendant-Appellee.

A petition for a rehearing in banc having been filed herein by counsel for the Appellant.

Upon consideration thereof, it is

ORDERED that the said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

RAUL PINTO,
Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the Appellant.

Upon consideration thereof, it is

ORDERED that the said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of November, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

GEORGE HOOPER,

Plaintiff-Appellant,

v.

A. L. BURBANK & CO., LTD., and TERMINAL STEAMSHIP CO.,

Defendant-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of Said District Court be and it hereby is Affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of December, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

GEORGE RICHTER,
Libelant-Appellant,

MATHIASEN'S TANKER INDUSTRIES, INC., and S. S. MICHAEL J., her engines, hull, tackle, cargo and her appurtenances thereof,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellees.

A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of December, one thousand nine hundred and sixty-one.

Present:

Hon. Charles E. Clark,
Hon. Carroll C. Hincks,
Hon. Henry J. Friendly,
Circuit Judges.

George Ezekiel,
Plaintiff-Appellant,

v.

Volusia Steamship Co., and Suwanee Steamship Co.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of Said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro,
Clerk.

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Supreme Court of the United States

OCTOBER TERM 1961

No. 683

RAUL PINTO,
against *Petitioner,*
STATES MARINE CORPORATION OF DELAWARE,
Respondent.

GEORGE HOOPER,
against *Petitioner,*
TERMINAL STEAMSHIP COMPANY,
Respondent.

GEORGE EZEKIEL,
against *Petitioner,*
VOLUSIA STEAMSHIP CO., and
SUWANEE STEAMSHIP CO.,
Respondents.

GEORGE RICHTER,
against *Petitioner,*
MATHIASEN'S TANKER INDUSTRIES, INC., and S.S. MICHAEL J, her engines, hull, tackle, cargo and her appurtenances thereof.
Respondents.

BRIEF ON BEHALF OF RESPONDENT TERMINAL STEAMSHIP COMPANY IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT M. PELLEGRINO,
Proctor for Respondent,
Terminal Steamship Company,
67 Wall St.,
New York 5, N. Y.

On the Brief,
ALBERT D. KOCH.

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Supreme Court of the United States

OCTOBER TERM 1961

No.

RAUL PINTO,

Petitioner,

against

STATES MARINE CORPORATION, OF DELAWARE,

Respondent.

GEORGE HOOPER,

Petitioner,

against

TERMINAL STEAMSHIP COMPANY,

Respondent.

GEORGE EZEKIEL,

Petitioner,

against

VOLUSIA STEAMSHIP CO., and
SUWANEE STEAMSHIP CO.,

Respondents.

GEORGE RICHTER,

Petitioner,

against

MATHIASEN'S TANKER INDUSTRIES, INC., and S. S. MICHAEL J., her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

BRIEF ON BEHALF OF RESPONDENT TERMINAL STEAMSHIP COMPANY IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Counter Statement of Questions Presented

1. No question is presented on behalf of the Petitioner, George Hooper, as to the nature of the warranty of seaworthiness or that the warranty of unseaworthiness may, or may not be invoked only upon proof of negligent causation and notice. The Circuit Court did no more than to affirm that the Trial Court had before it ample evidence upon which to base its conclusions that the storage of the cargo was proper and that no unseaworthy condition was proven to have existed, and that it had ample evidence for holding that if the warranty of unseaworthiness were to ever extend to longshoremen solely on the basis that the cargo to be handled was inherently dangerous, plaintiff's proof fell short of establishing such liability based on any inherent defect in the cargo, improper handling or unusual hazard.

Statement of Facts as to Petitioner, George Hooper

This was a civil action tried by United States District Judge David N. Edelstein without a jury. On March 22, 1961, judgment was entered dismissing the complaint.

Petitioner's case is set forth by Judge Edelstein in his findings of fact as follows:

> "3. The S.S. *Lumber Carrier* loaded its deck cargo on the west coast.
>
> 4. The deck cargo was not out of the ordinary in amount or height on this voyage.
>
> 5. Inspections and survey of the deck cargo aboard the S.S. *Lumber Carrier*, were made on the west coast and the cargo was found to be properly stowed and the vessel seaworthy.
>
> 6. The S.S. *Lumber Carrier* sailed from the west coast and on the voyage in question its first port of call was Bridgeport, Connecticut.

of lumber in such a manner as to enable the ship's gear to lower them over the side.

18. Between 2:30 and 3:30 P.M. on June 27, 1964, Hooper and Gatto were working in the vicinity of the No. 4 and No. 5 hatches preparatory to discharging a draft of lumber some 5' high, and 12' to 14' in length. The draft was loaded fore and aft and the top layer of the after end fanned out, requiring straightening.

19. In the process of preparing the load for discharging, Hooper faced the draft of cargo with his back toward the rail near the offshore side of the vessel, sank a cargo hook into the board furthest away from him and started to pull a plank into position. While in the act of so doing, the footing, consisting of further lumber cargo, shifted so as to cause Hooper to lose his off balance to his side. As Hooper lost his balance, he tried to steady himself by holding on to the hook, but the hook twisted out of the plank and Hooper, with the hook in his hand, fell over the side of the ship into the water, some 35' below.

20. It has not been established by a fair preponderance of the credible evidence that the stowage was improper.

21. It has not been established by a fair preponderance of the credible evidence that the vessel was unseaworthy."

On November 24, 1965, the Circuit Court of Appeals, Chief Judge Lumbard, Circuit Judge Medina and Circuit Judge Waterman, affirmed the decision of the Trial Court.

REASONS FOR DENYING THE WRIT

I. The decision of the Court of Appeals is consistent with and in no way violates the teachings of the United States Supreme Court.

The concepts of law set forth by the Court of Appeals have not been shown to conflict with the United States Supreme Court or with the uniform and prevailing opinion of the Courts of Appeal for any other Circuit. The Hooper case was not in fact determined upon the existence of a temporary condition, or knowledge of that condition, but rather was decided upon the plaintiff's failure to prove that any such condition existed. Respondent respectfully submits that the Court of Appeals was correct in its holding that there was ample evidence upon the record to support the Trial Judge's findings. However, considering in general all the cases presented in the Writ by Petitioners there has been no showing of any reason which would justify the granting of the writ of Certiorari.

The very fact that the four cases grouped together within the petition were all decided against the various appellants by the Court of Appeals for the Second Circuit in and of itself shows that uniformity and not conflict exists within the said jurisdiction. No case within the Circuit has been pointed to by the Petitioners as inconsistent with the positions set down in the cases at bar as to the nature of unseaworthiness. The Petitioners has not alluded to any case from any other Circuit Court which runs a conflicting precedent as to the nature of the warranty has been set forth.

The decisions of the Court of Appeals for the Second Circuit were made in the guiding light provided by the United States Supreme Court and constitute a valid

interpretation within the ray of this beacon, taking full and just heed to such cases as *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926; *Poignant v. United States* (2nd Cir.), 225 F. 2d 505; and *Alaska Steamship Co. v. Petterson*, 347 U. S. 396 (1954).

This is amply demonstrated by the language and explanation found in the following quote in the recent Court of Appeals decision in *Pinto v. States Marine Corporation of Delaware*, 296 F. 2d 1:

> "A conclusion that liability for a temporary condition is not different in legal nature from liability for a permanent one does not mean that the duration of the condition, the measures prescribed for dealing with, and the feasibility of achieving perfect safety at all times, are irrelevant to deciding whether the owner had met his obligation to furnish "a vessel reasonably suitable for her intended service." 362 U. S. at 550. *Poignant v. United States*, 225 F. 2d 505 (2 Cir. 1955), cited with approval in Mitchell, 362 U. S. at 550, n. 12, see also P. 542, had said that a vessel does not become unseaworthy by reason of a temporary condition caused by a transient substance, if even so the vessel was as fit for service as similar vessels in similar service." P. 508, and even Judge Frank's concurring opinion conceded, P. 602, that if defendant were to prove that there were no means, reasonably available, to keep the passageway free of garbage, the existence of the dangerous condition would not have constituted unseaworthiness."

As indicated in *Rhea v. United States Lines Company*, *supra*, at 923, we thus read *Mitchell* as holding that the trier of the facts is to determine whether the emergence and temporary continuance of a slippery or other hazardous condition does or does not leave a vessel "reasonably suitable for her intended service," 362 U. S. at 550, on the

II. The facts in evidence do not establish any unseaworthy condition or inherent danger.

> evidence that whatever might be claimed to be a defect in the vessel had some connection with the occurrence."

The District Court in the case at bar set forth the one sentence which reduces the conflict to its simplest terms: "The mere fact of shifting alone is not enough to sustain plaintiff's burden of proving improper stowage."

The Circuit Court has recently confirmed that a shipowner is obliged only to furnish a vessel and appurtenances reasonably fit for their intended use, and that a ship is not rendered unseaworthy by a temporary condition, if the ship remains reasonably safe. This was the holding in *Blier v. United States Lines Company*, 86 F. 2d 930, cert. den. —— U. S. —— which reviewed the doctrine of unseaworthiness in the light of the Supreme Court decision in *Mitchell v. Trawler Racer, Inc.* 362 U. S. 539. The opinion of Judge Medina emphasized that proof of a condition aboard a vessel does not establish unseaworthiness unless it rendered the vessel not reasonably fit for the voyage.

The respondent's position in the instant case is far stronger, as no dangerous condition has ever been established. The *Blier* decision reaffirms that a shipowner is not required "to furnish an accident free ship".

The Court below recognized the authority of *Caraballese v. Naviera Aznar, S.A.*, 285 F. 2d 355 (2d Cir. 1960), where the question posed was whether or not the owners of a vessel warrant to longshoremen not simply a safe place in which to handle cargo, but cargo which is safe to handle. The Court of Appeals was not so disposed to extend the owners' liability merely on the basis of inherently dangerous cargo, at least not on the facts therein presented, stating "If unseaworthiness may ever be based

solely on a dangerous condition in cargo that is being loaded, there must be more substantial proof than plaintiff offered here."

In the case at bar, the lower Court in commenting on the *Carabellese* case, correctly stated that, "Even assuming that unseaworthiness could be based on any of the hypotheticals advanced by the Court, *plaintiff's proof falls short of establishing liability based on any inherent defect in the cargo, improper handling or unusual hazard*". (Emphasis added.)

III. No intra circuit conflict exists within the Second Circuit as to the questions allegedly presented by this petition for a writ of certiorari.

It cannot be denied that if an "intra circuit conflict" exists as to an important principle, justification would exist for the United States Supreme Court to exercise its discretion and grant a Writ of Certiorari. However, in the petition at bar there is a manifest failure to show any such conflict. Again it is significant to note that Petitioner has failed to direct the Court's attention to one decision from the Second Circuit of the Court of Appeals in conflict with the cases and principles in which he seeks review.

Petitioner has done no more than ask the United States Supreme Court to grant the Writ of Certiorari based on his assertion that an "intra circuit conflict" exists because of the existence of a minority voice heard in dissenting opinions within some of the cases at bar.

In fact the cases cited by Petitioner in support of his request for Certiorari based upon "intra circuit conflict" clearly indicate that to justify review on this basis necessitates the co-existence of two or more inconsistent and contradictory Circuit Court decisions which still possess

vitality and pertain to the same points of law and are concerned with matters of significant importance. These authorities in no way indicate that the mere existence of a dissenting voice, even if constantly asserted, gives rise to a sufficient "intra circuit conflict" justifying Certiorari. In a limited sense, any minority dissent represents "intra circuit conflict" but no amount of semantic juxtaposition can turn this type of conflict into the broader nature of conflict within a Circuit, which would justify review. Respondent respectfully submits that the existing decisions within the Court of Appeals for the Second Circuit are harmonious and constitute a uniform position on the questions allegedly presented herein.

The result manifest in allowing Petitioner's assertion that the presence of a dissent justifies Certiorari, would open the flood gates of endless litigation and require an impossible criteria amongst jurists, that of complete unanimity. It is also significant to note that even if the foregoing standard be permitted, the petition for the Writ of Certiorari in the Hooper case still should not be granted since in this case no dissenting voice exists. It would appear that by virtue of the Circuit Court's affirmance without minority position, that unanimity has been reached and no basis exists for reviewing either the findings of fact or law presented therein.

It is finally submitted that the Court of Appeals was correct in holding that the Trial Court had ample evidence to support its decision.

In a sense, a Petitioner for a Writ of Certiorari brings a class action on behalf of those who are or who might be similarly situated. Since the Petitioner herein, George Hooper, has concededly failed to satisfactorily prove the existence of any inherent defect in the cargo, improper handling or unusual hazard, he does not qualify as the standard bearer for any questions pertinent to the rela-

tionship between the warranty of unseaworthiness and cargo which is inherently dangerous. In any event, if the nature of this relationship be such that liability exists for damages arising by virtue of inherently dangerous cargo, then under the facts surrounding the case at bar, this theory of liability could in no event inure to the benefit of the Petitioner.

Conclusion

No further need for clarification or instruction by the Supreme Court as to a shipowners' duty to longshoremen on board ship, of providing a reasonably safe place to work, has been shown to exist. In the case of Petitioner Hooper, recovery was denied on the basis that there was a failure to prove unseaworthiness based upon improper stowage or the presence of an unsafe place to work, or that the cargo was inherently dangerous or defective.

Respondent prays that the Writ of Certiorari be denied so that its rights be protected. The denial of the Writ as to the Petitioner Hooper, in no way affects any rights of crewmembers and longshoremen engaged in Maritime service. The right to recover in the absence of proof of the condition sought to be recovered from does not exist in law and consequently, that which was never possessed cannot be deprived.

Respectfully submitted,

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 683

RAUL PINTO,
Petitioner,
AGAINST
STATES MARINE CORPORATION OF DELAWARE,
Respondent.

GEORGE HOOPER,
Petitioner,
AGAINST
TERMINAL STEAMSHIP COMPANY,
Respondent.

GEORGE EZEKIEL,
Petitioner,
AGAINST
VOLUSIA STEAMSHIP CO., and SUWANEE STEAMSHIP CO.,
Respondents.

GEORGE RICHTER,
Petitioner,
AGAINST
MATHIASEN'S TANKER INDUSTRIES, INC., and S.S. MICHAEL J. her engines, hull, tackle, cargo and her appurtenances thereof.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT, MATHIASEN TANKER INDUSTRIES, INC. BRIEF IN OPPOSITION TO CERTIORARI

VICTOR S. CICHANOWICZ,
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Mathiasen's Tanker Industries, Inc.

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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

RAUL PINTO,

Petitioner

AGAINST

STATES MARINE CORPORATION OF DELAWARE,

Respondent

GEORGE HOOPER,

Petitioner

AGAINST

TEXMICH STEAMSHIP COMPANY,

Respondent

GEORGE EZEKIEL,

Petitioner

AGAINST

VOLLMER STEAMSHIP CO. and SEAWAY STEAMSHIP CO.,

Respondents

GEORGE RUSSELL,

Petitioner

AGAINST

MATHIASEN TANKER INDUSTRIES, INC. and SS MICHAEL J. her engines, etc., tackle, cargo and her appurtenances thereof,

Respondents

RESPONDENT, MATHIASEN TANKER INDUSTRIES, INC. BRIEF IN OPPOSITION TO CERTIORARI

Petitioner George Richter while employed as a Second Assistant Engineer aboard the Tanker Michael J sustained an injury to his right ankle when he fell from a metal shelf which was about a foot above the deck and on which petitioner was standing with both feet and making an inventory of some spare parts which were stored on an upper shelf in a small store-room aboard the vessel.

On the trial, as pointed out by the Court of Appeals in its opinion (p. 60 of Petition) and contrary to petitioner's misstatement in the petition (p. 6) of Petition) there was no claim nor proof that petitioner's fall was caused by a slippery shelf. The only reason which petitioner could offer for his fall was that, although the vessel was then proceeding in ballast in inland waters and the sea was calm he may have lost his balance due to a roll of the vessel or a change of course by the vessel. There was no claim that the shelf on which petitioner was standing did not at the time furnish a firm foothold or that the position which petitioner voluntarily assumed was in any way dangerous or precarious. In fact, petitioner testified that based upon his experience of some thirty (30) years aboard ships the way in which he was conducting the inventory was not only the customary manner but also the only way in which it could be carried out with safety.

The sole basis which petitioner offered in support of his claim for damages was the bare contention that since no ladder was available the Trial Court was compelled to find the vessel unseaworthy even though on petitioner's own testimony it was established that a ladder would not have been feasible under the circumstances for the work petitioner was doing.

The Trial Court refused to follow this erroneous concept, and found as follows:

> "11. The libelant has failed to prove by a fair preponderance of the credible evidence that the failure to provide the libelant with a ladder rendered the S.S. MICHAEL unseaworthy since by his own testimony, the use of a ladder in the small store room was not feasible and in the Court's opinion the use of an unattached ladder would be highly dangerous."

On appeal to the Court of Appeals, petitioner stated that he did not challenge the Trial Court's findings of fact and conceded that they were correct in all respects. Petitioner, however, urged that the Trial Court's finding based on the evidence that the alleged non-availability of a ladder did not render the vessel unseaworthy was in error as a matter of law and that it was in conflict with this Court's decision in *Mitchell v. Trawler Racer*, 362 U. S. 539 and assorted other lower Court cases. Petitioner now was contending that having established an accident and shown that the work could have been done in a different manner, the vessel should have been found unseaworthy though it concededly would have been highly dangerous to do it in such a manner. No negligence concept of notice either entered into or was material on the issue on appeal. The Court of Appeals affirmed the trial court purely because of a failure of proof. In this connection it said:

> "The fact that on a vessel an accident occurred and a seaman was injured in the course of his duties does not, without more, prove that the vessel was unseaworthy. We conclude, as the Judge below concluded, that the libelant has produced no evi-

> ible evidence whatsoever to support his claim of unseaworthiness."

Thus, petitioner's libel was dismissed by the trial Court and the dismissal was affirmed by the Court of Appeals not because of a mis-application of negligence concepts or because of any unauthorized judicial legislation but solely for a failure of proof. Such characterizations as slippery shelf, "dangerous and precarious position", lack of a firm foot hold and hand hold, etc., find no support in the record but are purely a product of petitioner's imagination and are designed to create an apparent though fictitious basis for review by this Court.

POINT I

The opinion of the United States Court of Appeals is not in conflict with this Court's opinion in *Mitchell* v. *Trawler Racer, Inc.* or other decisions referred to in the petition. The Trial Court and the Court of Appeals correctly found that mere proof of injury coupled with a suggestion that a different procedure might have been followed without more does not spell out unseaworthiness.

In *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, this Court pointed out that though concepts of negligence were not to be the measure of liability under the concept of seaworthiness, the obligation to provide a seaworthy vessel did not cast the shipowner in liability merely because an accident occurred on his ship. Mr. Justice Stewart, in delivering the opinion in the *Mitchell* case, stated (362 U. S. 539 at p. 550):

> "What has been said is not to suggest that the owner is obligated to furnish an accident free ship.

> The duty is absolute, but is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin v. Lykes Bros. S.S. Co.*, 348 U. S. 336."

The Court of Appeals in affirming the judgment below followed this teaching of this Court when it said:

> "The fact that on a vessel an accident occurred and a seaman was injured in the course of his duties does not, without more, prove that the vessel was unseaworthy. We conclude, as the Judge below concluded, that the libelant has produced no credible evidence whatsoever to support his claim of unseaworthiness."

Clearly, therefore, both the Trial Court and the Court of Appeals followed the decision of this Court in the *Mitchell* case.

Thus, petitioner's argument that the Court of Appeals incorrectly interpreted the concept of seaworthiness and that it engaged in unauthorized judicial legislation is, therefore, obviously illusory. The plain fact is, as is indicated by the language of the Court of Appeals, that petitioner failed to establish that the vessel was in any way unseaworthy and that it was because of this failure on the part of the petitioner to carry his burden of proof that he was denied recovery.

POINT II

In view of the evidence and findings below there is no basis for review by this Court.

Even assuming that there was a basis in the record for petitioner's version of the facts this Court cannot accept them as a basis for granting certiorari in preference to the findings of the Court below. In the first place petitioner has conceded their validity by not challenging them in the Court of Appeals. Secondly, however, since the Trial Court's findings are supported by the evidence and are not clearly erroneous they can neither be disregarded nor set aside. *McAllister v. United States*, 348 U. S. 19. Any question as to whether the decision below merits review must be determined on such facts and not those which either do not exist or have not been established.

The decision below is, therefore, clearly not in conflict with decisions of this Court and creates no intra or inter circuit conflict. Furthermore, petitioner's failure to sustain his burden of proof creates no issue of importance which warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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CICHANOWICZ & CALLAN,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1960

No. 683

RAUL PINTO,

Petitioner,

against

STATES MARINE CORPORATION OF DELAWARE,

Respondent.

GEORGE HOOPER,

Petitioner,

against

TERMINAL STEAMSHIP COMPANY,

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GEORGE EZEKIEL,

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against

VOLUSIA STEAMSHIP CO., and SUWANEE STEAMSHIP CO.,

Respondents.

GEORGE RICHTER,

Petitioner,

against

MATHIASEN'S TANKER INDUSTRIES INC., and S.S. MICHAEL J., her engines, hull, tackle, cargo and appurtenances thereof,

Respondents.

BRIEF ON BEHALF OF THE RESPONDENTS VOLUSIA STEAMSHIP CO. AND SUWANEE STEAMSHIP CO. IN OPPOSITION TO THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Suwanee Steamship Co.

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Supreme Court of the United States

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against

MATHIASEN'S TANKER INDUSTRIES, INC., and SS MICHAEL J, her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

BRIEF ON BEHALF OF THE RESPONDENTS VOLUSIA STEAMSHIP CO. AND SUWANEE STEAMSHIP CO. IN OPPOSITION TO THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of Questions Presented by the Petitioner, George Ezekiel

The issues stated in the combined Petition for Writ of Certiorari under the heading of "Questions Presented" have no application to the petition of George Ezekiel. Petitioner's action was litigated upon the question of whether or not goggles had been supplied to him for chipping rust aboard the *M/V Arctic Reefer*. The District Court made a finding of fact adverse to the Petitioner on this issue. The Court of Appeals has affirmed. It is this finding of fact which Petitioner wishes to have reviewed by this Court. Questions as to the nature of the warranty of seaworthiness, notice, or negligent causation do not enter this case in the presence of the District Court's factual findings.

Statement of Facts as to the Petitioner, George Ezekiel

This action, commenced on the Civil side of the District Court and transferred to the Admiralty Docket, was tried in the United States District Court for the Southern District of New York before Judge John W. Holland without a jury. On April 14, 1961 judgment was entered dismissing the complaint (libel). The dismissal was affirmed by the decision of the United States Court of Appeals for the Second Circuit dated December 15, 1961.

The Petitioner, George Ezekiel, a Honduran national, was employed as an A.B. aboard the *M/V Arctic Reefer*, a Liberian flag vessel, earning $108 per month. While the *Arctic Reefer* was lying in Puerto Barrios, Guatemala, the Petitioner was chipping rust above deck and, in some manner, caught a piece of rust in his right eye. He was ashore for treatment of this injury for under two months. The allegation in the petition that Ezekiel was blinded is contrary to fact.

At the time of his injury, the Petitioner apparently did not have his eyes covered by a pair of goggles. The question of why they were not so covered was the principal issue between the parties. It has never been a part of Petitioner's case that the available tools, including goggles, were in any way deficient or defective.

The Respondents' evidence, of which no mention is made in the Petitioner's "Statement of Facts", has been outlined by the Court of Appeals as follows:

> "Defendant introduced the deposition of Bodden, the *Arctic Reefer's* chief officer. His testimony was that each of the seven members of the deck crew, including Ezekiel, had been issued a pair of goggles in March and had been informed that if 'at any time the goggles should be lost or injured it was their duty to report in order for replacement of a new pair'; that a notice was posted to this effect, stating also that replacements were to be obtained from the chief officer; that, pursuant to a written order from the company, he kept six spare sets of goggles in a locker in his office; that it was the custom on the ship for men to come to him for supplies so maintained; but that Ezekiel had never sought a replacement for his goggles. Bodden testified also that, on two previous occasions, one about a month and the other about a week before the injury, he saw Ezekiel chipping rust with goggles around the neck but not on the eyes, and remonstrated about this; Ezekiel promised to be careful on the first occasion and made no answer on the second. After the accident Bodden asked Ezekiel whether he had his goggles on; Ezekiel answered 'No.' Bodden asked why, but got no reply.
>
> In giving judgment for the defendant, Judge Holland found, in an opinion delivered at the close of the trial, 'that goggles for the prevention of injuries to the eye to be used by a crew member in the chipping of rust were a part of the maintenance of the vessel in

question required by the standard of seaworthiness,' 'that in connection with the performance of a chipping of rust operation, seaworthiness requires the making of goggles available to the crew member who is ordered to perform such an operation,' and 'that the evidence in the case demonstrates that both of those duties which I have outlined heretofore as to seaworthiness have been met by the respondent.' The judge declined a request by plaintiff's counsel to consider more detailed findings and conclusions which counsel wished to prepare.

"Reading the findings together as we must, the last quoted finding means at least that the judge had determined, as he was amply warranted in doing, that goggles had been issued to plaintiff, that plaintiff had been instructed to come to the chief officer for a replacement if they were lost or damaged, and that replacements were available."

POINT I

Neither the opinion of the District Court nor the opinion of the Court of Appeals is in conflict with this Court's opinion in *Mitchell* v. *Trawler Racer, Inc.* or the other decisions mentioned in the petition.

A reading of the decisions below will amply demonstrate that both the District Court and the Court of Appeals followed closely this Court's opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539. In fact, it should be apparent from those decisions that it is not a conflict with that decision but a following of it in the Courts below of which the Petitioner complains.

Judge John W. Holland in the District Court cited and then quoted the following portion of this Court's opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550:

"There is ample room for argument, in the light of history, as to how the law of unseaworthiness should

have or could have developed. Such theories might be made to fill a volume of logic. But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history.

"What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." 362 U. S. 539, 550.

The occasion for this citation was a *rejection* of *Petitioner's* argument which would incorporate concepts of negligence in the doctrine of seaworthiness. The argument re-appeared before the Court of Appeals and was there answered as follows:

"Even if plaintiff's testimony were to be taken at face value, it did not compel the judge to find that the single alleged misfeasance by the boatswain made him not 'equal in disposition and seamanship to the ordinary men in the calling.' *Keen v. Overseas Tankship Corp.*, 194 F. 2d 515, 518 (2 Cir.), cert. denied, 343 U. S. 966 (1952); *Boudoin v. Lykes Bros. S. S. Co.*, 348 U. S. 336 (1955). The only remaining basis of liability would be the boatswain's alleged action standing by itself. But we have just reaffirmed, without disagreement on that point, that allegedly imprudent action by a seaman's superior is not within the concept of unseaworthiness even though it may be within that of negligence. *Pinto v. States Marine Corporation of Delaware*, ___ F. 2d ___ (2 Cir. 1961), petitions for

rehearing and rehearing *in banc* denied, Nov. 20, 1961, as was held long ago in *The Osceola*, 189 U. S. 158 (1903), and *Chelentis* v. *Luckenbach SS. Co.*, 247 U. S. 372 (1918), and recently in *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4 (6 Cir. 1956); *Penedo Cia Naviera S. A.* v. *Maniatis*, 262 F. 2d 284 (4 Cir. 1959); and *Lind* v. *American Trading & Production Corp.*, supra; see Gilmore & Black, The Law of Admiralty (1957), 320, and Judge Learned Hand's discussion in *Grillea* v. *United States*, 232 F. 2d 919, 922 (2 Cir. 1956)."

The two opinions below reveal that it was not any failure to divorce the doctrine of seaworthiness from concepts of negligence, nor consideration of transitory conditions that lead to the dismissal. Rather the conclusions of the Courts were founded upon the simple factual basis that the Respondent had supplied and made available to the Petitioner goggles for the performance of his work.

POINT II

No conflict exists in the interpretation of the doctrine of seaworthiness as applicable to the Petitioner Ezekiel.

The joint Petition for a Writ of Certiorari alleges that these four cases raise common questions of the interpretation of the warranty of seaworthiness, but that there is an intra-circuit conflict as to this interpretation. Certainly to the extent that there is a common quesion among these cases the decisions present no conflict. Petitioners make no citations of other cases which might be in conflict either within or without the Second Circuit. Their sole basis for the application for a writ is the dissent voiced in two of the cases, in one instance by Judge Clark and in the other by Judges Smith and Clark. We do not believe that this Court wishes to grant a review of all cases in which a dissent is noted below and most particularly when

such dissent is premised upon a disagreement as to a factual conclusion. It seems apparent that in the case of Petitioner Ezekiel, Judge Clark dissented primarily because he would have reached a different conclusion than the trial judge or the majority of the Circuit Court upon the primary question of whether or not a Respondent had supplied the Petitioner with goggles.

The petition for a Writ of Certiorari should therefore be denied.

CONCLUSION

The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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Suwanee Steamship Co.

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 683

RAUL PINTO,

Petitioner,

against

STATES MARINE CORPORATION OF DELAWARE,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 683

RAUL PINTO,

Petitioner,

against

STATES MARINE CORPORATION OF DELAWARE,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of April 9, 1962, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed January 25, 1962 herein.

Opinions Below

The opinions of the Court of Appeals in the instant case had not been reported at the time of the filing of the original petition. They are now printed in full at 296 F. 2d 1-9.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 2101.

Questions Presented

1. Are considerations of "duration of condition" and determination of "how long" before the accident a dangerous condition existed aboard a vessel, relevant criteria in determining liability under the doctrine of unseaworthiness.

2. Is a shipowner excused from liability under the absolute duty imposed by the doctrine of unseaworthiness because the dangerous condition which causes the accident is but a "momentary phase in the work" aboard the vessel.

Statement

The petitioner, Raul Pinto, an able bodied seaman, was directed to carry a heavy signal light down from the wheelhouse to the engine room of a vessel, with the aid of ordinary seaman Fantroy. While descending the ladder in the engine room, he fell, allegedly because of the presence of grease on one of the steps of the ladder.

Both he and Fantroy testified that they saw the grease there immediately after the fall. No testimony was presented as to how long before the accident the grease had been there. The Jones Act—negligence count alleged in the complaint was therefore withdrawn at trial.

Several ship's officers testified on respondent's behalf that they examined the area at varying times before and after the accident and saw no grease there.

At the trial below, it appeared that the essential issue for the jury to decide would be whom to believe; petitioner and Fantroy, or the ship's officers. However, the learned Trial Judge, Hon. Edward Weinfeld, U. S. D. J., in his charge stated:

> "* * * the mere momentary presence of oil in the area does not in and of itself render the vessel unseaworthy. Before you can find that the vessel

> was unseaworthy *plaintiff must satisfy you* by a fair preponderance of the evidence *that the alleged condition* of oil or grease, which he claims caused him to slip, *was not a momentary phase* in the normal progress of work in and about the engine room, but that oil and grease was permitted to accumulate in sufficient quantity so that the vessel was rendered unseaworthy. In other words, *it is not required that the vessel have a crew member handy with a rag to wipe off oil the very minute it is placed in an area.*" (Emphasis added.)

Plaintiff's counsel took exception to this charge on the specific grounds:

> "* * * that whether it was transitory or not wouldn't make any difference on a charge of unseaworthiness, and therefore, for the record we take an exception to that.
>
> We respectfully ask your Honor to charge that if the physical condition as it existed at that precise time was not reasonably safe for carrying down a particular blinker light, then they should not be concerned whether or not the condition was created just a few minutes before or a long time before. I don't think it makes any difference."

The jury returned a verdict for the respondent and the Trial Court entered judgment thereupon on March 15, 1960.

The Court of Appeals for the 2nd Circuit, affirmed the judgment of the District Court on October 26, 1961, in an opinion by Circuit Judge Friendly, joined in by Chief Judge Lumbard; Circuit Judge J. Joseph Smith dissenting. A petition for rehearing and rehearing *in banc* was decided on November 28, 1961, Circuit Judge Clark dissenting in an opinion joined in by Judge Smith.

Reasons for Granting Rehearing and Issuing the Writ

1. **Certain defects in the original petition have been corrected.**

This petition for rehearing is submitted on behalf of petitioner, Raul Pinto, alone. The prior petition, for which rehearing is here sought, was filed on behalf of four different petitioners (Docket No. 683). Counsel has now been advised that this procedure was improper.

This Court has several times stated that when the original petition was improperly prepared or defective, and such defect was cured in the subsequent petition for rehearing, the subsequent petition would be given full consideration on its merits. See cases cited by Stern and Gressman, *Supreme Court Practice* (2nd Ed.), pages 354-355.

2. **There is a high concentration of maritime personal injury litigation in the Second Circuit.**

In view of this high concentration of such litigation in the Courts of the Second Circuit, it is respectfully submitted that the instant petition for rehearing may and should be given special attention by this Court, even were there an absence of direct conflict of decision with the opinions of other Circuit Courts. (See *Schriber-Schroth Co. v. Cleveland Trust Co.*, 350 U. S. 573; where this Court granted certiorari on a petition for rehearing despite an apparent lack of conflict of decision "because of the concentration of the automobile industry in the Sixth Circuit.")

3. **A pending case before this Court raises similar or related issues.**

This Court recently granted certiorari for the second time in the case of *Morales v. City of Galveston*, 368 U. S.

816. The *Morales* case raises identical questions with the instant case with regard to maritime law and the doctrine of unseaworthiness.

Upon this Court's first review in *Morales* v. *City of Galveston*, 364 U. S. 295, remanding 275 F. 2d 491 and 181 F. Supp. 202, a judgment that unseaworthiness could not arise instantaneously from the overflow of contaminated grain was remanded *per curiam* by the Supreme Court "in light of Mitchell v. Trawler Racer, Inc., 360 U. S. 539."

Upon the above mentioned remand (291 F. 2d 97) the Fifth Circuit again declined to find that an unseaworthy condition existed subsequent to the instantaneous contamination there involved. The vigorous dissent of Judge Rives, on the remand, asserted that time could not be a factor in determining unseaworthiness (291 F. 2d at 98-99).

It is unmistakably clear that the same question as that in the *Morales* case, *i.e.*, whether or not time is a relevant factor in determining the existence of liabilty under unseaworthiness, is involved in the instant case. (Compare Circuit Judge Smith's dissent [296 F. 2d at 8] and the dissent of Circuit Judge Clark [296 F. 2d at 8-9] with Circuit Judge Friendly's opinion on behalf of himself and Chief Judge Lumbard, particularly at 296 F. 2d at 6 and 7, where Judge Friendly stated that considerations of "the duration of the condition" and "how long" the condition had pre-existed the accident were relevant factors in determining the issue of liability under unseaworthiness.)

This Court has held that a petition for rehearing will be granted where the same or a related issue has come before this Court in other cases still pending. *Pickett* v. *Union Terminal Co.*, 313 U. S. 591; 314 U. S. 704; 315 U. S. 386, 394; Stern and Gressman, *Supreme Court Practice* (2d Ed.), page 354.

If this Court should reverse the Fifth Circuit Court's determination in *Morales* v. *City of Galveston*, *supra*, and adopt, in any part, the views of Judge Rives in his dissent below, it is more than likely that such determination would directly affect the instant case. This Court has in the past set down different cases involving similar or related issues of law to be argued simultaneously. See *e.g. Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783; *Wade* v. *Dichmann, Wright, and Pugh*, 337 U. S. 801, and *Fink* v. *Shepard Steamship Co.*, 337 U. S. 810.

It is respectfully submitted that in light of the fact that the analogous case of *Morales* v. *City of Galveston*, *supra*, is pending before this Court at present, the petition for rehearing herein may either be granted for separate argument or for argument in conjunction with the *Morales* case, or may be held in abeyance for determination or remand in light of this Court's determination of *Morales*. This last procedure is precisely what this Court adopted on the first presentation of *Morales* (364 U. S. 295) when it remanded that case in light of its determination in *Mitchell* v. *Trawler Racer, Inc.*, *supra*.

4. The intra-circuit conflict within the Second Circuit Court of Appeals has become more pronounced.

[The determination hereinbelow carries within itself a showing of intra-circuit conflict.] Circuit Judge Clark's dissent from the denial of the petition for rehearing *in banc* on behalf of himself and Judge Smith, expressly stated that "we cannot be expected to go contrary to what we believe to be the clear mandate of the Supreme Court by reason of a panel precedent" (296 F. 2d at 9).

Judge Clark was thus stating for both himself and Judge Smith that they would not follow the reasoning or result reached in the decision written by Judge Friendly. Judge Clark has previously made clear in a

maritime personal injury action, "that in a proper case a panel of this Court may frankly state its disagreement with the decision of another panel and refuse to be bound thereby." *Dunbar v. Henry Dubois' Sons Co.*, 275 F. 2d 304, 306, certiorari denied 364 U. S. 815. Furthermore, Judge Clark's reference to the "really troublesome division of view" (296 F. 2d at 9) in the instant case suggests that while other Circuit Judges of the Second Circuit Court of Appeals were unwilling to join Judge Clark and Judge Smith in granting petitioner the extraordinary (in the Second Circuit) privilege of an *in banc* hearing, they did not all share the views expressed in Judge Friendly's majority opinion.

This intra-circuit conflict was further exposed by the subsequent opinion of the Second Circuit Court of Appeals in *Van Carpals v. The SS American Harvester*, 297 F. 2d 9, 11. There Judge Clark, writing for a unanimous panel, emphasized "the 'absolute' duty of the shipowner to furnish a seaworthy ship" and held that the shipowner's absolute duty could not be wiped out merely because there was no proof of the precise cause of the unseaworthy condition out of which the accident arose. A comparison of Judge Clark's language in *Van Carpals, supra*, with Judge Friendly's language in the instant case (296 F. 2d at 6 and 7) relating to opportunity and feasibility of correction of the dangerous condition as a relevant factor in determining liability under unseaworthiness, can only cause confusion for District Court Judges attempting to apply both Second Circuit Court authorities.

Judges Clark and Smith have served notice in their dissenting opinions (296 F. 2d at 8 and 9) that they will reverse any jury charge which is identical or similar to the charge that was given by Judge Weinfeld in the trial court herein. Judges Friendly and Lumbard have demonstrated

that they will reverse if any charge other than that given by Judge Weinfeld is given by a Trial Judge. Inasmuch as the various panels in the Second Circuit comprise but three judges, it is now uncertain as to the correctness of the wording of such a charge.

In such circumstances, and particularly in view of the congestion of maritime personal injury cases which are tried in the Eastern and Southern Districts of New York, even were there no conflict with decisions of other Circuit Courts, the instant case would cry out for the granting of certiorari.

5. There is a clear conflict with decisions of other Circuit Courts.

Circuit Judge Friendly's opinion herein specifically sets forth that there is a conflict of decision between the opinion in the instant case and language in two opinions of the Court of Appeals for the Fourth Circuit. Thus, Judge Friendly stated (296 F. 2d at 7, footnote 6):

> "The charge differed essentially from that disapproved in Grzybowski v. Arrow Barge Co., 4 Cir., 1960, 283 F. 2d 481, distinguished in Blier v. United States Lines Co., supra, 286 F. 2d at page 926, where the judge had instructed the jury to consider the absence of previous complaint by the plaintiff or request for corrective action by the ship; we agree with the decision on that basis, *although the opinion contains some language with which we do not.* Similarly the decision in Puerto Seguro Cia. Naviera, S. A. v. Pitsillos, 4 Cir., 1960, 279 F. 2d 599, is not opposed to our view of Mitchell, *although certain of the language is;* the Court of Appeals simply sustained a permissible finding of unseaworthiness by a judge as trier of the facts." (Emphasis added.)

6. The opinion below conflicts with holdings of this Court.

The petitioner's position on appeal below was that following *Mitchell* v. *Trawler Racer, Inc., supra.*, decided on May 16, 1960, two months after Judge Weinfeld's charge herein to the jury, time could not be an element in an action in unseaworthiness, and it was therefore error to charge the jury that the momentariness of the presence of grease might relieve the shipowner of liability.

The majority opinion on the original appeal held that it would be proper to charge that "a momentary condition would not impose liability automatically" (296 F. 2d at 7). With this petitioner fully agrees, because first the jury must find that the condition was one which rendered the vessel not reasonably safe. Judge Weinfeld, however, charged the jury below that:

> "Before you can find that the vessel was unseaworthy, plaintiff must satisfy you [ ] that the alleged condition [ ] was not a momentary phase in the normal progress of work. [ ] it is not required that the vessel have a crew member handy with a rag to wipe off oil the very minute it is placed in an area."

As Judge Smith stated in his dissenting opinion, (296 F. 2d at 8), such a charge absolves the shipowner because of the momentary nature of the condition, a consideration, it is submitted, fully ruled out by this Court in *Mitchell*.

In *Mitchell*, *supra*, after a full review of unseaworthiness cases decided over the past century and a half, this Court concluded "that liability for a temporary unseaworthy condition is (no) different from the liability that attached when the condition is permanent" (362 U. S. at 550).

In *Mitchell, supra,* this Court held the shipowner's liability for a transitory condition to be absolute, without regard for its opportunity to correct the condition, the shipowner's control over the conditions or equipment involved, the shipowner's knowledge or notice of the dangerous condition, or its exercise of reasonable care to correct the condition. Thus, this Court stated "that the (shipowner's) duty is (no) less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, (and) that the duty is (no) less with respect to an unseaworthy condition which may be only temporary" (362 U. S. at 549).

This Court, in *Mitchell,* reversed the charge of an outstandingly able District Court Judge, who had stated to the jury that "as far as the owner-operator of the vessel goes, it is his job to see it does not stay there too long * * *" (362 U. S. at 540, footnote 2), and upheld the exception of Mitchell's trial counsel who had stated "if there is an unseaworthy condition, there is an absolute situation, there is no time required" (362 U. S. a 541, footnote 3).

Six months after deciding *Mitchell, supra,* this Court re-expressed the absolute nature of the liability of the shipowner under seaworthiness and stated that "no amount of due care or prudence excuses him, whether he knew *or could have known* of its deficiency at the outset or after use." *Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 81 S. Ct. 6, 9 (1960); (emphasis added).

Accordingly, it is respectfully submitted that not only is the majority opinion below in the instant case one which involves intra-circuit conflict within the Court of Appeals for the Second Circuit (see Point 4 hereinabove); and one which involves stated conflict of decision with other Circuit Courts, (see Point 5 hereinabove); but is also, upon the analysis hereinabove set forth, one in conflict with the

doctrine of maritime law enunciated by this Court's determination in *Mitchell* v. *Trawler*, *supra*, and *Michalic* v. *Cleveland Tankers, Inc.*, *supra*.

No citation of authority is necessary for the well settled proposition that this Court has always wielded a supervisory eye and arm with regard to seamen's personal injury actions, both under the Jones Act and under the general maritime law of unseaworthiness, and that when Courts stray from the application of principles enunciated by this Court, certiorari and reversal will be granted by this Court. It is respectfully submitted that the Circuit Court's failure to apply the principles enunciated by this Court in *Mitchell* and *Michalic* is so clear as to justify this Court's considering entering a reversal and remand summarily upon the papers on the instant petition for certiorari, as it did in *Palermo* v. *Luckenbach S.S. Co.*, 355 U. S. 20.

7. The opinion below is in conflict with the weight of authority.

The Second Circuit Court of Appeals applied *Mitchell*, *supra*, on May 31, 1960 in *Calderola* v. *Cunard Steamship Company*, 279 F. 2d 475. There, defendant submitted a request to charge uncannily similar to the one given herein by Judge Weinfeld.*

The Trial Judge rejected the request and defendant appealed. The Circuit Court held, pursuant to this Court's decision in *Mitchell*, *supra*, that the denial of defendant's request was proper, (279 F. 2d at 477).

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* "That the alleged condition of grease on which the plaintiff claims to have slipped was not a momentary phase in the progress of the work on board but existed for a period of time prior to the alleged accident (*Grillea* v. *United States*, *supra*, *Mitchell* v. *Trawler Racer*, C. C. A. 1, April 7, 1959 [27 U. S. Law Week 2520])"; Defendant's Request to Charge 2a, Record on Appeal, p. 159a, Appendix to Brief of Defendant-Appellant and Third Party Plaintiff-Appellee, Cunard Steamship Co., and Third Party Defendant-Appellant, John T. Clark & Son.

In *Carabellese* v. *Naviera Azuar, S.A.*, 285 F. 2d 355, 359 (1960), the Second Circuit Court of Appeals stated "*Mitchell* * * * settles that a vessel cannot avoid liability for unseaworthiness merely because the owner has had no opportunity to remedy the unsafe conditions."

In Poignant v. *United States*, 225 F. 2d 595 (1955), five years before *Mitchell*, the Second Circuit Court held that unseaworthiness liability could arise as to conditions occurring after the onset of the voyage. In a concurring opinion, Circuit Judge Frank spelled out liability for a transitory slippery substance, quoting from and adopting Judge Bigg's dissenting words in *Cookingham* v. *United States*, 184 F. 2d 213, 216 (3rd Cir., 1950), cert. den. 340 U. S. 935, 71 S. Ct. 495:

> "If the stairway was in a condition dangerous for the use for which it was intended, however, 'transitorily', it was unseaworthy. It remained so while the unsafe condition persisted. *The element of time which has intruded itself in this case in both the opinion of this court and that of the court below is irrelevant under the doctrine of the shipowner's absolute liability.*" (225 F. 2d at 603) (Emphasis added.)

That Judge Frank's concurring decision in *Poignant* was essentially adopted by this Court in *Mitchell* is clearly indicated in Mr. Justice Harlan's comments in his dissenting opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. at 570-573, and by Circuit Judge Medina's reference in *Blier* v. *United States Lines Company*, 286 F. 2d 920, at 924 (2d Cir. 1961).

None of the Circuit Court opinions citing *Mitchell* and discussing the issue here involved adopt the position that considerations of "how long" are admissible in an action on unseaworthiness. See *Arena* v. *Luckenbach Steamship Co.*, 279 F. 2d 186, 189 (1st Cir. 1960); *Calderola* v. *Cunard Steamship Co.*, 279 F. 2d 475, 477 (2nd Cir. 1960); *Puerto Segura Cia. Naviera, S.A.* v. *Petros Pitsillos*, 279 F. 2d 599,

600 (4th Cir. 1960); *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481, 485 (4th Cir. 1960); *Carabellese* v. *Naviera Aznar, S.A.*, 285 F. 2d 355, 359 (2nd Cir. 1960); *Knox* v. *United States Lines Co.*, 294 F. 2d 354, 358 (3rd Cir. 1961).

For an incisive District Court review of the issue, concluding that duration of condition cannot be a factor in an action on unseaworthiness, see Judge Hoffman's opinion in *Holley* v. *The Manfred Stansfield*, 186 F. Supp. 212, 215-216 (E. D. Va. 1960).

It is respectfully submitted that many opinions of Circuit Courts of Appeals, including several of the same Second Circuit are here involved. This Court's opinion in the *Mitchell* case has been erroneously applied and interpreted in the instant case. In addition the precursor opinion by Circuit Judge Frank in *Poignant* v. *United States*, *supra*, also directly contradicts the holding by Circuit Judge Friendly and Chief Judge Lumbard in the instant case, thus justifying review and reversal by this Court.

The majority opinion below is unmistakably an important and significant decision in the law relating to recovery for maritime personal injury, and will directly affect the conduct of this type of case within the Second Circuit and probably within other Circuits. It will thus be of significant and perhaps decisive effect in that class of litigation which makes up by far the largest group of actual trials held in the District Courts within the Second Circuit and perhaps within other circuits within the Federal system as well.

Circuit Judge Friendly's opinion herein asserts that it deals with questions left open by this Court's opinion in *Mitchell*. If this is so, it is of utmost importance that this Court grant review and set forth its own conclusions as to how these further questions should be decided. If, as petitioner here asserts, the opinion below is simply in direct

conflict with this Court's prior determinations, then for these reasons certiorari should be granted or reversal should be summarily entered.

CONCLUSION

In view of the basic nature of the issue here involved and its relationship to the whole scope of maritime liability, the vital effect of the decision herein on innumerable cases now actually pending in the District Courts, and the different position taken on this issue by other Circuit Courts, we respectfully request that a rehearing be granted in this matter, and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

THEODORE H. FRIEDMAN,
of Counsel.

Certificate of Counsel

I, JACOB RASSNER, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified and Rule 33 of the Rules of this Court.

JACOB RASSNER,
Attorney for Petitioner.

Office-Supreme Court, U.S.
FILED
MAY 4 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1961

No. 683

GEORGE HOOPER,

Petitioner,

against

TERMINAL STEAMSHIP COMPANY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1961

No. 683

GEORGE HOOPER,

Petitioner,

against

TERMINAL STEAMSHIP COMPANY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of April 9, 1962, denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed January 25, 1962 herein.

Opinion Below

The opinion of the Court of Appeals in the instant case had not been reported at the time of the filing of the original petition. It is now printed in full at 296 F. 2d 281.

Question Presented

1. Whether "inherent danger" which renders a ship unsafe to work on is an exception to warranty of seaworthiness.

Reasons for Granting Rehearing and Issuing the Writ

1. Petitioner combined his petition with three other petitioners. This fact may have had some bearing on the denial of petitioner's writ. Therefore, petitioner prays that his petition be considered on its own merits, free from any consideration of the other petitions.

2. The Court of Appeals for the Second Circuit on May 1, 1962, rendered a decision which is diametrically contrary to the decision by the Court below in petitioner's case. (*Halecki* v. *United N. Y. & N. J. Sandy Hook Pilots*, 4 CA 2d, =277, decided May 1, 1962, unreported as yet).

The Court below, in petitioner's case, held that "inherent danger" is an exception to the rule which imposes the absolute duty of fulfilling the warranty of seaworthiness on a shipowner towards maritime workers aboard such ship.

The case decided May 1, 1962 (*Halecki, supra*), holds this is not so.

This intervening conflict of decision (arising since denial of the petition herein) creates confusion as to whether or not "inherent danger" constitutes an exception to a shipowner's nondelegable duty to provide a seaworthy vessel to maritime workers thereon.

It is obvious that this question affects practically every maritime claim predicated on unseaworthiness, as many dangerous conditions may be factually classified as "inherently dangerous", and merely by such classification destroy a basic and substantial right of maritime workers, employed in a hazardous calling, to the right of protection by the imposition of an obligation on the shipowner to provide a safe place to work without any insulation against liability by reason of any real or theoretical excuse of due care.

Argument

Mindful of the fact that matter heretofore submitted is ordinarily not a proper matter for reprint in an application for a rehearing, but in order to obviate the need of the Court to dig from the original petition those parts which pertain to petitioner, we are reprinting, as an Appendix, that part of the original petition pertinent to petitioner's prayer for rehearing, solely for the convenience of the Court.

The decision in the *Halecki* case, *supra*, was written by Circuit Judge Medina, who is one of the Judges who concurred in the decision in the case at bar.

The following statement from *Halecki, supra*, seems to be a change of view of Judge Medina himself.

> "Finally, the shipowners contend that there is no obligation on their part to provide a reasonably safe place to work 'where the work itself creates a danger.' It is, we think a sufficient answer to say that the rule is to the contrary in that class of cases, such as the one now before us, where the shipowner requires work to be done in a manner inherently dangerous to human safety. In such cases the shipowner is required by law to take reasonable precaution to prevent injury to the employees of subcontractors engaged to do the work."

Circuit Judge Waterman, who concurred in the opinion of Chief Judge Lumbard in the decision below, seems likewise to have changed his views as recently as April 30, 1962, in the case of *DeLima v. Trinidad Corporation*, (C. C. A. 2d, #290, decided April 30, 1962 (unreported as yet), wherein the Court, in reversing the Trial Court below, held, in substance, that there is no exception to the absolute duty of furnishing a seaworthy vessel, and that reasonable care and caution is no exception to the rule.

Should the labelling of a dangerous condition as "inherent danger" be permitted to insulate shipowners from liability for breach of warranty of seaworthiness, there is nothing to prevent shipowners from escaping from the proximate consequences of breach of duty by the mere expediency of labelling each and every dangerous condition as an "inherent danger."

Petitioner submits that it is in the interest of the entire industry, employers and employees, to know whether or not exceptions to the absolute and nondelegable duty of providing a seaworthy vessel may be invented or declared as a bar to recovery, meeting each new set of facts with a novel exception to the rule.

Respectfully submitted.

JACOB RASSNER,
Attorney for Petitioner.

Certificate of Counsel

I, JACOB RASSNER, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 33 of the Rules of this Court.

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

This was a civil action tried by United States District Judge David N. Edelstein without a jury. On March 22, 1961, judgment was entered dismissing the complaint.

Petitioner's case is set forth by Judge Edelstein in his findings of fact as follows:

"17. On June 27, 1954, George Hooper and a fellow longshoreman known as Eugene Gatto were engaged in stacking, packing and compiling drafts of lumber in such a manner as to enable the ship's gear to lower them over the side.

"18. Between 2:30 and 3:30 p.m. on June 27, 1954, Hooper and Gatto were working in the vicinity of the No. 4 and No. 5 hatches preparatory to discharging a draft of lumber some 5' high, and 12' to 14' in length. The draft was loaded loose and all over the top layer of the after end turned out, requiring straightening.

"19. In the process of preparing the load for discharging, Hooper turned the draft of cargo with his back toward the rail near the off-shore side of the vessel, sank a cargo hook into the board furthest away from him and started to pull a plank into position. While in the act of so doing, the tottering, consisting of further lumber cargo, shifted so as to cause Hooper to be thrown off balance to his side. As Hooper lost his balance, he tried to steady himself by holding on to the hook, but the hook pulled out of the plank and Hooper, with the hook in his hand, fell over the side of the ship into the water, some 35' below."

On November 24, 1961, the Circuit Court of Appeals—Chief Judge Lumbard, Circuit Judge Medina and Circuit Judge Waterman—affirmed the decision of the Trial Court (original petition, pp. 4 and 5).

The only case cited by the Trial Court as authority in the Hooper case, supra, for the decision, is misinterpreted.[4]

The case of *Carabellese* v. *Naviera Azuer, S.A.*, 285 F. 2d 355 (2nd Cir. 1960), dealt with a stevedore negligently causing a piece of cargo to fall.

It is incomprehensible that the decision in the *Carabellese* case, *supra*, was so incorrectly interpreted in the face of the following language by Circuit Judge Friendly at page 359:

> "Since there was no evidence that the owner had known or could have known of the latent defect, this

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[4] The *Dixon* case, *supra*, has been cited, with approval, innumerable times, and as recently as May 16, 1960 by the United States Supreme Court, in the case of *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926.

None of the Circuit Court opinions citing *Mitchell* and discussing the issue here involved adopt the position that considerations of "how long" are admissible in an action on unseaworthiness. *Arena* v. *Luckenbach Steamship Co.*, 279 F. 2d 180, 180 (1st Cir. 1960); *Calderola* v. *Cunard Steamship Co.*, 279 F. 2d 475, 477 (2nd Cir. 1960); *Puerto Segura Cia. Naviera, S. A.* v. *Petros Patsilleas*, 279 F. 2d 599, 600 (4th Cir. 1960); *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481, 485 (4th Cir. 1960); *Carabellese* v. *Naviera Azuer, S. A.*, 285 F. 2d 355, 359 (2nd Cir. 1960); *Morales* v. *City of Galveston*, 291 F. 2d 97 (5th Cir. 1961); *Knox* v. *United States Lines Co.*, 294 F. 2d 354, 1961 A. M. C. 1708, 1715 (3rd Cir. 1961).

In *Carabellese*, this Court stated: "*Mitchell* * * * settles that a vessel cannot avoid liability for unseaworthiness merely because the owners have had no opportunity to remedy the unsafe conditions" (285 F. 2d at 359).

In the Circuit Court's opinion on remand in *Morales*, the majority opinion did not discuss the time element, essentially taking a position on the facts similar to that expressed by this Court in *Blier*. The vigorous dissent of Judge Rives asserted that time could not be a factor in determining unseaworthiness (291 F. 2d at 98-99).

For a persuasive District Court review of the issue, concluding that duration of condition cannot be a factor in an action on unseaworthiness, see Judge Hoffman's opinion in *Holley* v. *The Manfred Stansfield*, 180 F. Supp. 212, 215-216 (E. D. Va., 1960).

> must have been designed to bring out that the grate had in effect become a part of the working surface supplied to the longshoreman, so that the owner would be liable for a latent defect in the crate as he would for one in the deck or even, as was held in Grillea v. United States, 2 Cir., 1956, 232 F. 2d 919, for a misplaced cover which the injured longshoreman had himself installed over part of a hatch. The same principle underlies Rich v. Ellerman & Bucknall S. S. Co., 2 Cir., 1960, 278 F. 2d 704. That, like the instant case, related to an injury sustained in loading, but 'the unseaworthiness lay in the stowage of truck chassis previously loaded which turned out to afford an unstable footing. Thus the chassis in Rich, like the crate in Reddick and the hatch cover in Grillea, had become, as was said in the Grillea case at p. 923, 'as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place.'"

Justice Harlan, before his elevation to the United States Supreme Court, and while gracing the Bench of the United States Court of Appeals for the Second Circuit, in one of the most scholarly decisions ever written on the question of unseaworthiness, in the case of *Dixon* v. *United States*, 219 F. 2d 10, decided February 7, 1955, explained, in detail, the shipowner's duty to furnish a seaman with a safe place to work, tracing the law back to the case of *The Noddleburn*, D. C. D. Or. 1886, 28 F. 855 (original petition, pp. 14-15).

The decision by the Court below is contrary to the clear mandate of the Supreme Court.

That the fact that the decisions by the Court below constitute adoption of minority view as controlling is clearly demonstrated by Judge Clark in his dissenting opinion, concurred in by Judge Smith, in the *per curiam* decision in the petition for a rehearing *in banc* in *Pinto* v. *States Marine Corporation of Delaware*, 296 F. 2d 1-9.

The decision by the Court below is in conflict with all prior decisions treating with the question of seaworthiness, the latest two being as follows:

> *Edna Fall, as Admrx. of the Estate of Philip Fall* v. *Esso Standard Oil Company* (5th Cir.), decided December 13, 1961, No. 18578 (not officially reported as yet);
>
> *Massa* v. *C. Z. Venezuelan Navigation, etc.*, (2nd Cir.), decided January 15, 1962, No. 27059 (not officially reported as yet).

In the *Massa* case, *supra*, decision by Circuit Judges Waterman, Smith and Marshall, the Court stated:

> "The doctrine of unseaworthiness imposes upon a ship owner an absolute duty to furnish a vessel and appurtenances thereto reasonably fit for their intended use. Mitchell v. Trawler Racer, Inc., 362 U. S. 539 (1960). The fact that the stevedoring firm may have supplied the defective appurtenance, here the pallet, does not absolve the vessel owner from liability under the doctrine. Petterson v. Alaska S. S. Co., 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954); Reed v. The Yaka, 183 F. Supp. 69 (E. D. Pa. 1960). Nor is the fact that the injury occurred on shore a bar to recovery so long as the requisite maritime 'status' or 'relation' is present. Strika v. Netherlands Ministry of Trade, 185 F. 2d 555 (2 Cir. 1950), cert. denied 341 U. S. 904 (1951); Litwinowicz v. Weyerhaeuser Steamship Co., 179 F. Supp. 812 (E. D. Pa. 1959)."

Implicit within, and expressed by, all Supreme Court decisions in point, is the clear instruction that no distinction shall be made, based on time, circumstances or causation of an unsafe place to work, aboard ships in navigation.

No lexiphonic or grandiloquent language constitutes a substitute for a shipowner's duty to provide his crew and

longshoremen with a reasonably safe place to work. The expediency of giving descriptive names to existing dangers in nowise changes the true facts.

A ship is either seaworthy or not.

Words are but mere sound, whereas seaworthiness is a realistic requirement on which rests the lives and safety of all persons working in maritime service as a means of earning a living (original petition, pp. 24-25).

A new burden of proof has erroneously been established by the Court below.

Proof of preventive, separable or alienable nature of unseaworthiness is now required of the accident vjctim, as further burden of proof, never required heretofore, that is if the holding by the Court below, in petitioner *Hooper's* case, is to be considered good law.

The Court below erroneously made findings of fact in a manner which is in direct conflict with the holding by this Court in the case of McAllister v. United States, supra (348 U. S. 19, 75 S. Ct. 6).

The trial court in the *Hooper* case herein did not make a finding of "inherent danger".

The uncontradicted evidence was that the manner of affixing the cargo chains, when the cargo was originally loaded, caused a buckling of the deck lumber and created spaces between many piles of lumber. The proof was that these conditions *created* the proximate danger which caused the footing, on which Hooper was working, to suddenly shift and throw him overboard (fol. 231, Hooper Record).

The labelling of such unsafe conditions as "inherent danger" and therefore not unseaworthy, does violence to the true meaning of words in common usage and merits review for correction by the Supreme Court (original petition, p. 26).

Office-Supreme Court, U.S.
FILED
MAR 22 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1961

No. 683

RAUL PINTO,

Petitioner,

against

STATES MARINE CORPORATION OF DELAWARE,

Respondent.

GEORGE HOOPER,

Petitioner,

against

TERMINAL STEAMSHIP COMPANY,

Respondent.

GEORGE EZEKIEL,

Petitioner,

against

VOLUSIA STEAMSHIP CO. and SUWANEE STEAMSHIP CO.,

Respondents.

GEORGE RICHTER,

Petitioner,

against

MATHIASEN'S TANKER INDUSTRIES, INC. and S.S. MICHAEL, her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents.

RESPONDENT STATES MARINE CORPORATION OF DELAWARE'S BRIEF IN OPPOSITION TO PETITION OF RAUL PINTO FOR WRIT OF CERTIORARI

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Supreme Court of the United States

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Respondents.

RESPONDENT STATES MARINE CORPORATION OF DELAWARE'S BRIEF IN OPPOSITION TO PETITION OF RAUL PINTO FOR WRIT OF CERTIORARI

Opinions Below

By opinion decided October 26, 1961, the Court below affirmed judgment of the District Court against petitioner, Raul Pinto, one of the petitioners, after a jury verdict in favor of this respondent in the District Court in the Southern District of New York. The final opinion as amended by the Court on its own motion by an order of November 1, 1961, is reported in full in 296 F.2d 1.

By Per Curiam decision decided November 28, 1961, a panel of nine judges of the Court below in banc denied a petition of the said petitioner for a rehearing. A copy of said opinion is attached hereto and marked Exhibit "C" in the Appendix.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Preliminary Statement

Respondent States Marine Corporation of Delaware is involved only in the *Raul Pinto* case. *Pinto* resulted in a jury verdict for the defendant. This fact sets it aside from the *Hooper*, *Ezekiel* and *Richter* cases which resulted in dismissals by the Court alone.

Excerpts from Facts in *Raul Pinto* Case

The S S "Clovis Victory", the vessel involved in this case, was owned by the United States on De-

ember 11, 1957. A shipyard had built the vessel for the United States.

United States government experts, engineers and designers prescribed specifications for all the details as to the construction of the vessel, including the ladders in the engine room. R. 150-160.

The testimony indicated that the steps in the ladder was built according to specifications, which dictated that the steps of the ladder were to be accident proof. The steps was not slick and worn. The vessel was practically new. When the government contracted with the defendant to operate the vessel during the voyage when petitioner Pinto was hurt, it had been used very little. The steps had no solid surface for accumulation of grease or oil to cling to. Upright, thin, narrow strips were used for constructing the steps.

Testimony of witnesses indicating the above will be found in Record filed by petitioner at pages 37, 46, 183, 211, 138, 139.

Questions Presented by Respondent, States Marine Corporation of Delaware

In the light of the verdict in favor of defendant, affirmance thereof by the Court of Appeals, and denial of a petition for rehearing in banc, respondent raises the following questions with respect to petitioner Pinto:

1. Is there a valid conflict in the decisions of the United States Court of Appeals, Second Circuit, of the exceptional and serious nature urged upon this

warrants certiorari? With respect to facts and law the following questions apply only if the Court regards question 1 in the affirmative.

(2) Where the trial judge charged the jury that a shipowner's duty to supply a seaworthy vessel is absolute and non-delegable, several times with respect to physical structure, appurtenances, and an adequate competent crew and officers, regardless of the shipowner's fault, regardless of the exercise of diligence and reasonable care, and regardless of notice, does his passing reference to a momentary defect, coupled with instruction of reasonable fitness for use as the essential test, rather than absolute perfection, render the charge, when read in its entirety, contrary to the later decision of this Court in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539?

STATEMENT I

Raul Pinto, an able-bodied seaman of the S.S. "Clovis Victory", brought this action to recover damages for personal injuries against States Marine Corporation of Delaware. The action was premised on alleged negligence and alleged unseaworthiness. The S.S. "Clovis Victory", a government-owned vessel, was operated by the defendant. The complaint alleged, and defendant admitted, that plaintiff was employed by the defendant.

The Third Mate of the vessel carried a sixty pound blinker light down the stairs of the engine room for repairs. No block and fall was used.

(R. 382)

"Q. I see. Now, can you help us any way

with respect to this angle of using a block and fall? You are a mate. Tell us what is there. A. Well, with the type of object in use——"

Q. What? A. With the type of object that is in question here, I would deem it rather foolish to attempt to use a block and tackle. The object, the weight of it, as I said before, I did the job myself, and in my estimation, I didn't think it was necessary.

Q. Even the hook on this block and fall, does that weigh more than this object? A. Well, they do have a rig in the engine room which is for heavy machinery.

Cross-examination by Mr. Rayner:

(387)

Q. Would you consider a 75 pound light—when I say light, I mean a signal light, equipment—a heavy or light object? A. Well, having handled it myself, as I previously testified, I didn't consider it heavy enough to lower down with a rig."

Thereafter he directed the plaintiff and an Ordinary Seaman to carry the blinker light down the same engine room stairs for additional repairs.

Plaintiff seeks recovery under the Merchant Marine Act approved June 5, 1920, Section 33, 46 U.S.C.A. 688

Originally the case was premised on negligence and unseaworthiness. During the trial plaintiff's counsel withdrew the negligence case leaving but the issue of unseaworthiness to be decided by the jury.

There came a time when plaintiff returned to work for defendant. He severed from one of its vessels. He sought employment with Moore McCormack Lines, Inc., and after having a physical examination returned to sea as a crew member of one of its vessels.

STATEMENT II

Petitioner Pinto seeks consideration of an additional question.

Petitioner's trial counsel made it clear to the trial judge in chambers that he had no exception to the charge. The ruling of the trial judge as to an oral request was considered by the United States Court of Appeals for the Second Circuit at petitioner's request and that court ruled that the oral request was too broad.

STATEMENT III

Unwarranted and unjustified is petitioner Pinto's criticism of the decisions of the Circuit Judges of the United States Court of Appeals for the Second Circuit who do not agree in all respects with his counsel.

This petitioner's brief charges that court with erroneous and unauthorized judicial legislation and contends that rights heretofore had by petitioner Pinto have been denied him.

Unfortunately or otherwise, said petitioner, strenuously urges that the lower courts have made such decisions that all other seamen's rights have been put in jeopardy of complete nullification. His counsel

seemingly overlooks the prestige which the Second Circuit has had for many years in its interpretation of Admiralty Law.

Incidentally, more than fifty percent of the litigation in the court where the Pinto case was tried have to do with maritime matter.

The petitioners are disappointed with the Appellate Court's decision. Therefore, they bring an application which is characteristic of a class action and attempt to downgrade an Appellate Court which have been renowned throughout the nation in its interpretation of Maritime Law.

See Respondent's Appendix p. 5, wherein will be found discussion of cases which have been cited by Petitioner Pinto's counsel with approval.

STATEMENT IV

With respect to the claim of worn and slick step, appellant did not feel aggrieved in the lower court as to the charge on that phase of the case.

See Respondent's Appendix p. 7 in which there is testimony indicating that the claim of a worn and slick step was false and untrue.

POINT I

There is no intra-circuit conflict in the Decisions of the United States Court of Appeals, Second Circuit within the purview of the decisions of this Court which would indicate granting certiorari. The dissent of one judge in two different panels and the dissent of two judges in a panel of nine sitting in banc does not constitute intra-circuit conflict of decision inasmuch as the decisions of the panels themselves and the decisions of the judges in banc are in conformity.

Petitioner urges that inasmuch as: (a) Honorable Charles E. Clark, Circuit Judge, dissented with the majority of the judges' opinions in the *Ezekiel* case and (b) Honorable J. Joseph Smith, Circuit Judge, dissented with the majority opinion of the panel of judges in the *Raul Pinto* case; (c) both Honorable Charles E. Clark and Honorable J. Joseph Smith dissented with the majority of the judges' decision, denying re-hearing, in the *Raul Pinto* case panel of judges sitting in banc, that notwithstanding that each of the panels of judges majority decisions conform to the decisions of each other and to the majority decision of the panel of judges in banc, that the dissenting decisions of the two judges constituted an intra-circuit conflict. It is submitted that the contention of petitioner with respect to intra-circuit conflict cannot be sustained inasmuch as one sole dissent of a circuit judge in any case in the same circuit would entitle a litigant affected thereby to urge that an intra-circuit conflict existed. This would be so whether the judges were sitting in regular panel or in panel in banc.

According to the statutes enacted by Congress (June 25, 1948, Chap. 646 Stat. 871), and in accordance with the United States Circuit Court of Appeals Rules, Section 25, petitioner could but suggest to the lower court that he have a rehearing in banc. Once his petition was filed it was entirely discretionary with the Second Circuit as to the allowance of the relief sought.

There is no intra-circuit conflict with respect to the interpretation of seaworthiness in the second circuit as all the decisions of the panels involved in the petition conform.

Furthermore, petitioner Pinto has failed to establish an intra-circuit conflict within the ruling of the two cases cited and relied on under Point I of his brief as will be seen below.

In *Dickinson v. Petroleum, etc.*, 338 U.S. 507, this court granted a certiorari because the Court of Appeals opinion stated that their decision was against the unanimous opinion of the court as constituted but they did so in deference to a precedent established by a differently constituted court of the same circuit.

In *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, the Court of Appeals in effect overruled prior decisions of the same circuit for misinterpreting a section of the Bankruptcy Act.

Also in Point I of petitioner's brief in referring to the dissenting opinion of Mr. Justice Frankfurter in *Rogers v. Missouri Pac. R.R. Co.* 352 U.S. 500, 530-531, petitioner omits the following significant language from his quotation thereof: "* * * certiorari

jurisdiction is a jurisdiction to be exercised sparingly and only in cases of special gravity * * *" and continuing is the statement that such were generally issued in the case of "* * * conflicts between Circuit Courts of Appeals * * *", not to intra-circuit conflicts within one circuit.

In the *Rogers* case certiorari was also granted because a lower court had deprived him of his rights to a jury determination after a jury had found in his favor, a court having set aside his verdict. The evidence in his case was sufficient to support the jury's verdict.

The facts in the *Rogers* case were similar to the facts in the *Pinto* case. However, the *Pinto* case does not fall within the category of cases where a lower court has persistently deprived the litigants of their rights to a jury determination.

1. Rogers backed off a culvert.

2. Pinto backed down a ladder.

The jury awarded damages to Rogers, a workman. The jury refused to award damages to Pinto a workman.

In the Pinto case the jury rejected Pinto's falsified contention that the step in the ladder was "worn and slick" and that grease and oil had accumulated on four or five strips of metal standing upright approximately $\frac{1}{4}$" wide in a hot engine room.

The jury considered the evidence and exhibits in the Pinto case meticulously to the extent that the foreman of the jury arose from the jury box and

came down in the well of the courtroom. He was in view of the eleven other jurors.

This foreman of the jury lifted the blinker light, which was marked in evidence (R. 438).

The replica of the step involved in the litigation; the blinker light; and the photograph of the ladder taken right after the occurrence were the only exhibits called for by the jury and sent to them by an order of the trial judge (Charge of the Court, p. 21).

In *Maggio v. Zeitz*, 333 U.S. 56, another bankruptcy question on which there were decisions in the same circuit that were clearly contradictory (not the fact here) the Supreme Court pointed to the fact that the Court of Appeals felt constrained, against its better judgment, to follow its own most recent decision on the question, a situation similar to *Dickinson*, supra.

This respondent urges again, most respectfully, (a) there is no true intra-circuit conflict involving (b) extraordinary circumstances or (c) a question of such extraordinary importance that this Court must decide it.

POINT II

There is no conflict in the decisions of the Court below with respect to any of the petitioners herein.

Both courts below found in favor of the defendants in the cases of the four petitioners seeking certiorari.

The opinions in the Second Circuit Court of Appeals in each of these cases show that there is a difference in the findings by the Circuit Judges in the application of the law because of the particular facts of the cases. Despite the language of the dissenting opinions, there is nothing to show that the application of the law in these cases constitutes any genuine conflict with the decisions of the United States Supreme Court. Further, there is no genuine conflict between the Second Circuit decisions in these cases of the petitioners with other decisions of the same circuit.

This respondent also urges that there is no intra-circuit conflict between the opinions in the *Ezekiel* case and the *Pinto* case. Ezekiel neglected to wear goggles which were provided to him for use while chipping rust with a hammer.

With respect to the facts in petitioner Richter's case, there was no proof of a slippery metal shelf. United States District Judge Noonan decided the case on the facts. He ruled that no credible evidence was produced upon which Richter could recover. The Appellate Court came to the same conclusion. This does not constitute intra-circuit conflict.

It is not too unreasonable to assume that the jury in the *Pinto* case found that plaintiff used no precautions for his own safety and that he exercised poor judgment in turning around and completely facing about while engaged in descending the straight stairway while helping to carry a flinker light.

Further, the ladder which he was descending happened to be of exceedingly safe construction, of fabricated steel in accord with the designs of experts employed by the United States Government.

Although the record indicates that Pinto did not fall on the floorplate of the engine room the Court inadvertently charged as follows:

> "He slipped while in the process of shifting and fell to the floor plate of the engine room." (Charge of the Court, p. 4).

This charge was contrary to the testimony of Second Assistant Engineer Black, who was in the court room and called as a witness for the plaintiff, who testified as follows (R. 311):

> "Q. Now, what are the facts? Did you catch this man? Did you catch this man Pinto? A. Catch him?
>
> Q. As he was falling, in your arms or anything? A. No, sir.
>
> Q. You didn't? A. I didn't.
>
> Q. And did he fall on the grating and on the floor? A. He never fell any place that I could see.
>
> Q. And did you take the light away from him? A. I did.
>
> Q. But he was standing up when you saw him? A. That's right; he was standing on about the third or fourth step. I don't know.

Q. But at any time did you see his hips or his body down in contact with those steps? A. No, no.

Q. All the time when you saw his legs, was he standing up? A. Standing up.

Q. Do you know that there is any reason for having all this, what do you call this latticework? A. You could call it that, call it grating, I guess.

Q. Grating? A. Yes, lattice.

Q. Is there any reason for having it that way, that you know of? A. Well, the only reason I know would be to keep dirt, grease or anything from accumulating."

To be more specific, the Appellate Court made a decision of affirmance on the rendition of a jury properly charged on the facts proven by the defendant.

POINT III

The Circuit Court of Appeals did not refuse to consider plaintiff's exception.

Its opinion states that counsel's improperly submitted oral request was, on its merits, too broad. And, if the charge was subject to any criticism, the court doubted whether the exception was apt to raise it.

The court must have considered the exceptions of plaintiff's counsel for the opinion states that the exceptions that were made were not well taken.

As to the plaintiff's contention that the trial judge had invaded the jury's province, the Appellate Court felt that a more specific objection was needed.

This court reviewed errors in a charge in *United States v. Atkinson*, 297 U. S. 157, 159, 56 S. Ct. 391, 392, 80 L. Ed. 555.

This court indicated two grounds for reviewing errors. Obviously these grounds are well known to this court. In this connection respondent urges that there was no magnificently obvious error in the trial judge's charge in the Pinto case. The charge indicates that Guy Pinto was a "ward of the Admiralty", his interests were given unusual care. Unusual care to such an extent that three times the jury was told that plaintiff's former employer was "absolutely liable" if. So, it is suggested that there was no error which seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Although the judge had not charged in line with the *Cookingham* case, 184 F. 2d 213, plaintiff's counsel, through an inadvertence, informed the trial judge that he had so charged. Charge of Court, p. 19 [illegible]

The Appellate Court must have given due consideration to plaintiff's exceptions for the opinion states that so "experienced a judge" well knew that the Second Circuit Court of Appeals had disapproved the *Cookingham* decision in deciding the *Pennisi* case.

POINT IV

The Trial Judge's charge was so emphatic as to the "absolute liability" of the shipowner that the casual use of the words momentary and transient was of no significance.

only the mate's overall competence to the extent that the judge would [illegible] as we think he did, it was the defendant who was entitled to complain." Petitioner's Appendix p. [illegible]

Petitioner Pinto's brief complains about the Trial Judge saying as follows:

"In this instance, the mere momentary presence of oil in the area does not in and of itself render the vessel unseaworthy." Charge of the Court, p. 18.

May it be said that the Trial Judge, being mindful of the ruling in the case of *Pennant v. United States*, (2nd Cir., 225 F. 2d 708), attempted to bring his charge within the purview of the ruling of the Second Circuit Court of Appeals.

After the trial of the Pinto case, this court in the case of *Mitchell v. Trawler Racer, Inc.*, 362 U. S. [illegible], stated, in substance, in the opinion as follows: "An accident-free" vessel is not required. "Absolute perfection" is not required under the "standard of seaworthiness."

It might be said that the Trial Judge, anticipating the reasonableness of the position to be taken by this court in the *Mitchell v. Trawler Racer, Inc.* case, stated that if a vessel was as fit for service as similar vessels in similar [illegible] it does not become unseaworthy by reason of a temporary condition caused by a transient substance. In this connection respondent urges that the jury were to understand that if the vessel was a reasonably fit place for the crew members to work, it was a seaworthy vessel.

Let our minds go back to the courtroom on the day of the rendition of verdict. The jury, composed of males and females, to say the least, were inexpert in the ways of engine rooms. They heard testimony that the engine room steps were constructed in such a manner as to prevent accumulation of oil thereon. They had an opportunity to take the replica of the step in their hands and examine it closely and observe the perpendicular strips of narrow metal of which the step was constructed.

They heard testimony that the steps was cleaned a few hours before the incident; that there was a special design of the steps of the ladder to prevent an accumulation of foreign substances; that there was a safety practice of cleaning the steps; and that there was absence of oil or grease on the steps shortly before the occurrence.

Question: Was the jury conscious of the one important omission? There was no evidence by the plaintiff as to when the grease alleged to have been on the step had gotten there. Neither the plaintiff nor his co-worker could enlighten the jury as to these important and requisite facts to be proved as part of plaintiff's case.

Was it an error for the Court to tell the jury that a momentary condition would not impose liability automatically? The jury were told that they were to take the duration of the condition and the feasibility of more complete prevention into whatever account it found appropriate. Realistically, the jury was told that it was not necessary to have a member of the crew with a rag to wipe off oil every minute if it alighted on the step. Respondent urges that such a discussion is just plain common sense and it is ex-

protect that the jurors will remain free from improper influences. [illegible] in the best interest in their solicitude.

All in all, the charge is a fair statement of the jury's [illegible] duty to render an impartial verdict. Moreover, all they told them was their [illegible] and whether or not to convict. They were told in substance that they were [illegible] the province of finding an accurate statement of [illegible] they "must" or "might" find the defendant guilty. About two months after Judge Weinfeld charged the jury, this Court held [illegible] the [illegible] "all accounts from" verdict is not mandatory. [illegible] "absolute performance" is not required since the [illegible] "substantial performance." The trial judge was charged. He stated that the doctrine of substantial performance [illegible]

Conclusion

There is no need for examination of [illegible] by the United States Supreme Court as [illegible] claim. Respondent prays that the application for a writ of certiorari be denied and that it [illegible] may be terminated.

Respectfully submitted,

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APPENDIX

Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and sixty-one.

Present: HON. EDWARD J. LUMBARD,
Chief Judge.

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

RAUL PINTO,
Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Exhibit A

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of Said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

Exhibit B

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and sixty-one.

Present: Hon. Edward J. Lumbard,
Chief Judge.

Hon. Henry J. Friendly,
Hon. J. Joseph Smith,
Circuit Judges.

Raul Pinto,
Plaintiff-Appellant.

v.

States Marine Corporation of Delaware,
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the Appellant,

Upon consideration thereof, it is

Ordered that the said petition be and hereby is denied.

A. Daniel Fusaro,
Clerk.

Exhibit C

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and sixty-one.

Present: Hon. Edward J. Lumbard,
Chief Judge.

Hon. Charles E. Clark,
Hon. Sterry R. Waterman,
Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Hon. J. Joseph Smith,
Hon. Irving R. Kaufman,
Hon. Paul R. Hayes,
Hon. Thurgood Marshall,
Circuit Judges.

Raul Pinto,
Plaintiff-Appellant,

v.

States Marine Corporation of Delaware,
Defendant-Appellee.

A petition for a rehearing in banc having been filed herein by counsel for the Appellant.

Upon consideration thereof, it is

Ordered that the said petition be and hereby is denied.

A. Daniel Fusaro,
Clerk.

Exhibit D

Discussion of Cases Wherein the Second Circuit Court of Appeals and District Judges of the United States District Court for the Southern District of New York Have Not Completely Nullified the Rights of Petitioner Pinto and Other Seamen.

See Appellate Court's decision in 1955 *Dixon* v. *United States*, 219 F. 2d 10. At that time Circuit Judge Harlan, now Justice Harlan of this court, succinctly enunciated the shipowner's duty to furnish a seaman with a safe place in which to work. Dixon's rights were not put in jeopardy of "complete nullification."

Circuit Judge Frank in a concurring decision in *Poignant* v. *United States*, (2nd Cir.), 225 F. 2d 595, failed to measure up to the image which petitioner Pinto's counsel is attempting to create of a judge completely nullifying and putting in jeopardy all seamen's rights.

Last year (1961) Circuit Court Judge Medina failed to put in jeopardy of complete nullification rights of seamen in *Blier* v. *United States Lines Company*, 288 F. 2d 920. United States District Judge Dimock charged the jury. This able district judge charged with respect to "transitory unseaworthiness." The rights of Blier were not nullified by the District Court or by the Second Circuit Court of Appeals, which is now criticized. Anyhow, this court denied Blier's application for a writ of certiorari.

Exhibit D

Unfortunately, the invective is insinuated with respect to the judges of the Southern District of New York, for Mr. Friedman seems to indicate in the conclusion of his brief that seamen and longshoremen and particularly Pinto, Hooper, Ezekiel and Richter will lose rights by complete nullification.

In this connection, consideration should be given to the fact that several times seamen's rights have not been nullified by the district judges.

Petitioner Pinto cites with approval Judge Dawson holding Tidewater Associated Oil Company liable in the Campbell case, 141 F. Supp. 431.

And, again, United States District Judge Weinfeld's ruling in *Buck v. United States*, 122 F. Supp. 25, aff'd. 222 F. 2d 165, is applauded by Pinto. There the question of "breach of warranty" of seaworthiness was involved.

Exhibit E

Testimony Proving That the Step Involved in the Case Was Not "Worn and Slick"

Direct examination of Frank B. Tymeson

By [illegible]

By Mr. Dunham:

Q. Well, what can you say as to the condition of those steps? Were they worn off or were they in regular condition or good order, whatever you want to call it? A. I have found the ladder in good order, and I might add that the reason that probably accounts for it being in good order is because the vessel had not been kept constantly in operation like the other Victory ships have, and the physical characteristics of the steel about the vessel had been in good condition, especially the ladders down below. There is no sign of wear at all.

Q. No sign of wear? A. No, sir.

Q. Now, tell me, I think you mentioned this was a Victory; is that a Government ship, that owned by States Marine, do you recall? A. Yes, sir.

Q. And you say it had not been used much, the ship? A. I understand the vessel had been laid up for some time and then taken out and assigned for operation to the States Marine Lines.

Exhibit E

(Cross-examination of Frank B. Tymoske by Mr. Rassner.)

(R. 467)

Q. To be quite specific, are the ladders constantly cleaned? A. They are; to the best of my knowledge.

Q. And they are constantly cleaned because there they constantly have an accumulation of grease or oil on it? A. No; in this particular case, no, because there can't be any accumulation due to the structure of the ladder. If there is anything at all on the ladder it would fall in between onto the floor plate or into the engine room.

Q. So that is it your testimony that the ladder (468) is constantly cleaned or that the ladder is not constantly cleaned? A. The ladder is constantly clean.

Q. And is it constantly cleaned of an accumulation of grease or oil or dirt? A. There can't be any accumulation on the ladder for the simple reason there is no solid surface for it to cling to.

(R. 475-481)

(By Mr. Dunham:)

Q. Well, what can you say as to the condition of those steps? Were they worn off or were they in regular condition or good order, whatever you want to call it? A. I have found the ladder in good order, and I might add that the reason that probably accounts for it being in good order is because the vessel had not (R. 480) been con-

stantly in operation like the other Victory ships have, and the physical characteristics of the steel about the vessel had been in good condition, especially the ladders down below. There is no sign of wear at all.

Q. No sign of wear? A. No, sir.

Q. Now, tell me, I think you mentioned this was a Victory; is that a Government ship chartered by States Marine, do you recall? A. Yes, sir.

Q. And you say it had not been used much, the ship? A. I understand the vessel had been laid up for some time and then taken out and assigned for operation to the States Marine Lines.